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No. 387

In the Supreme Court of the United States

OCTOBER TERM, 1948

TRANSCONTINENTAL & WESTERN AIR, INC.,
PETITIONER,

v.

CIVIL AERONAUTICS BOARD.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

BRIEF FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (R. 111) is reported at 169 F. 2d 893. The opinion of the Civil Aeronautics Board (R. 63) is reported at 8 C. A. B. (No. 52) 685.

JURISDICTION

The judgment of the Court of Appeals was entered on August 2, 1948 (R. 116). The petition for a writ of certiorari was filed on October 30, 1948, and was granted on December 6, 1948 (R. 118). The jurisdiction of this Court rests on 28 U. S. C. 1254.

QUESTION PRESENTED

Whether the Board has authority under the Civil Aeronautics Act to fix a new mail rate to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a mail-rate proceeding.

STATUTES INVOLVED

The statutory provision which is basic to the decision of this case is Section 406 (a) and (b) of the Civil Aeronautics Act of 1938, as amended,[1] which will be referred to as the Act. It provides:

> SEC. 406. (a) The Authority is empowered and directed, upon its own initiative or upon petition of the Postmaster General or an air carrier, (1) to fix and determine from time to time, after notice and hearing, the fair and reasonable rates of compensation for the transportation of mail by aircraft, the facilities used and useful therefor, and the services connected therewith (including the transportation of mail by an air carrier by other means than aircraft whenever such transportation is incidental to the transportation of mail by aircraft or is made necessary by conditions of emergency arising from aircraft operation), by each holder of a certificate authorizing the transportation of mail by aircraft, and to

[1] Act of June 23, 1938, c. 601, 52 Stat. 977, 54 Stat. 1235 (49 U. S. C. 401, *et seq.*).

make such rates effective from such date as it shall determine to be proper; (2) to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates of compensation for each air carrier or class of air carriers; and (3) to publish the same; and the rates so fixed and determined shall be paid by the Postmaster General from appropriations for the transportation of mail by aircraft.

(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, may fix different rates for different air carriers or classes of air carriers, and different classes of service. In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air

> carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

Other pertinent provisions of the Act are set forth in the Appendix, *infra*, pp. 100-108.

STATEMENT

A proper appraisal of the issue presented by this case necessitates an understanding of the facts relating to TWA's mail rates since January 1, 1945.[2] On that date the Board directed TWA, and the three other largest domestic air carriers, to show cause why their mail rates should not be reduced from 60 cents to 32 cents per ton-mile of mail carried. On August 13, 1945, with the termination of the war, the Board issued an amended statement of tentative findings and conclusions substituting a tentative mail rate of 45 cents per ton-mile for the rate of 32 cents previously proposed. TWA raised no objection to this latter proposal. Public hearing was held on September 14, 1945, at which the data underlying the Board's proposals was submitted for the record. The case was then submitted to the Board for decision.

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[2] *Transcontinental & Western Air, Inc., Mail Rates*, 6 C. A. B. 595 (October 26, 1945).

In its opinion, the Board discussed the changed circumstances resulting from the cessation of the war between the date of its original show cause order and its final order; it appended indices of selected operating statistics both actual and estimated for the future, and exhibits showing operating results and investment requirements, both actual and estimated for the future; it considered the similarity of costs and operating patterns for the four largest carriers, and upon such evidence and other factors decided to continue in effect uniform "service" rates[3] for such carriers;[4] and finally it considered the cost of the mail service.

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[3] The Board has developed two types of mail rates—the "service" mail rate and the "need" mail rate. The "service" rate bears a direct relationship to the cost of the mail service for which the rate is to be fixed. The "need" rate, on the other hand, is concerned with the deficiencies of the carrier's nonmail services and the amount of mail pay needed to maintain it in the sound condition contemplated by the Act. Burt and Highsaw, *Regulation of Rates in Air Transportation* (1946), 7 La. L. Rev. 1, 378, et seq.; *American Airlines, Inc., Mail Rates*, 3 C. A. B. 323, 337–338 (1942); *Braniff Airways, Inc., Mail Rates*, 4 C. A. B. 588 (1944); *Northwest Airlines, Inc., Mail Rates*, 4 C. A. B. 515 (1943).

[4] Although the cases of the "Big Four" were not consolidated, the decisions in all of the cases were rendered on the same date and fixed identical "service" mail rates for the carriers involved. See also *American Airlines, Inc., Mail Rates*, 6 C. A. B. 567 (1945); *United Air Lines, Inc., Mail Rates*, 6 C. A. B. 581 (1945); *Eastern Air Lines, Inc., Mail Rates*, 6 C. A. B. 551 (1945).

In conclusion, the Board stated as follows (6 C. A. B. 601–2):

> In our consideration of the fair and reasonable service mail rate we have given weight to the many uncertain short-run factors related to the transitional period as well as to the extraordinary circumstances and conditions in the air-transport industry which will materially affect the problems and attending risks which will confront management in the immediate future. A successful bridging of the difficult transitional period will, in our opinion, constitute a major step in the attainment by the industry of a healthy postwar status. Hence, it is not our intention here either to indorse or to enunciate any new philosophy or long-range principles of rate making. Instead, it is our purpose to fix a service mail rate which will be high enough to provide reasonable security against the risks inherent in the dynamic and uncharted transitional period ahead and which at the same time will be low enough to provide a strong competitive incentive for economical and efficient management. It is our further intention to fix a service mail rate which over the transitional period will provide a fair and reasonable return on the used and useful investment although on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low.

> In order that these objectives may be realized and that the mail rate may be kept at a level reasonably in accord with the dynamic operating conditions which will prevail during the present transitional period and provide an adequate margin of security against the uncertainties and risks which reasonably may be encountered, we conclude that a mail rate of 45 cents per mail ton-mile is required.
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> * * * * *
>
> As shown in appendix No. 2, the inclusion of mail revenue at 45 cents per ton-mile results in an estimated operating profit before income taxes of approximately $3,459,000 which, after 40 percent Federal income taxes, represents a return of 13.77 percent of the total investment required for the entire common carrier operations.

TWA did not ask the Board to reconsider its order; nor did TWA seek to have such order reviewed in Court pursuant to the provisions of the Act (Section 1006 (a), 49 U. S. C. 646 (a), *infra*, p. 107). The order became final on October 26, 1945. From that date until March 14, 1947, TWA performed required air carrier service and received presumably final payment therefor at the rate provided in that order. No action was taken by TWA, the Board, or the Postmaster General prior to March 14, 1947, to initiate a change in this rate.

On March 14, 1947, TWA filed a petition with the Board alleging that its mail rate had not been

fair and reasonable since January 1, 1946, and requesting the Board to fix a fair and reasonable rate "from and after January 1, 1946" (R. 8–13). Public Counsel of the Board moved to dismiss the petition insofar as it requested relief for the period from January 1, 1946, to March 14, 1947, when the petition was filed, on "policy" grounds (R. 13–21). After TWA filed an answer to their motion (R. 22–37), Public Counsel amended it to specify the Board's lack of "authority" to revise TWA's mail rate for the period prior to the institution of the proceeding as an additional ground (R. 38). Oral argument was heard on the motion (R. 39–60).

On December 2, 1947, the Board entered an order dismissing the petition "insofar as it requests the fixing of a mail rate for a period prior to March 14, 1947" (R. 91). The opinion of the Board stated that its action was based on its lack of power to grant the relief requested (R. 60–91). Member Lee dissented (R. 92–108).

On January 30, 1948, TWA applied for review of the Board's order to the United States Court of Appeals for the District of Columbia Circuit. The Court of Appeals concluded that the Board has no power to revise mail rates retroactively to a period in which a final rate previously entered by the Board was in effect and unchallenged, and on August 2, 1948, affirmed the order of the Board (R. 111–115).

SUMMARY OF ARGUMENT

A.

Congress patterned the Civil Aeronautics Act upon its previous regulatory enactments in the transportation field, and sought, through that Act, to apply the usual public utility regulatory principles to the air-transport industry. Those provisions of the Act applicable to the determination of rates for the carriage of mail embody public utility rate-fixing concepts which preclude the retroactive superimposition of new rates on rates previously finally established, for which petitioner here contends.

The Congressional directive that the Board, in fixing mail rates, must seek to enable air carriers "under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense" (Section 406 (b)), does not convert the Board's primary function of fixing rates of compensation for the future into a duty to award amounts of compensation for the past. This is clearly shown by the legislative history of the Act's mail pay provisions. Moreover, such a directive is not unique to the Civil Aeronautics Act and is found, in substantially identical form, in other legislation governing the transportation industry which undoubtedly embodies, neverthe-

less, a typical rate-making pattern. Under well-settled principles, such legislation precludes rate revision for a period in which a final rate previously fixed was in effect and unchallenged by the initiation of a new-rate proceeding. While rates promulgated on principles of public-utility regulation must afford a genuine opportunity to earn a fair return, they do not guarantee that such a return will, in fact, be earned.

Acceptance of the petitioner's contention that the Board has the power retroactively to revise finally established rates would thwart the Congressional purpose to establish a rate-making method for determination of mail pay and would impede the accomplishment of the very objective the Act was designed to achieve, the encouragement and development of a self-sufficient air transport system. While the petitioner insists that it seeks to establish only the power of the Board in this respect and that that power need only rarely be exercised, its view of the statutory and constitutional requirements would, in fact, require the general adoption of a system of cost-plus auditing to reimburse carriers for past losses and recapture excessive profits earned in the past. Certainly, if the Board does have a revisory power, the most obvious determinant of the propriety of its exercise would be whether, at all times, the applicable rates were "fair and reasonable." The Board would thus necessarily be

required to determine the fairness and reasonableness of the return to the carrier during a past period rather than the fairness and reasonableness of a rate for the carrier in the future. The cost-plus awards which would follow would remove all incentive for managerial efficiency and the development of nonmail revenues, and destroy any hope of establishing a uniform rate for a group of carriers appropriately classified.

B.

In the light of the manifest purpose of Congress to establish a public utility rate-making pattern for the determination of compensation for carrying mail by air, it is questionable whether that pattern could be taken to have been nullified by language in a subsection of the Act far more clear than that upon which the petitioner relies. Certainly, Section 406 (a) (1) of the Act, which empowers the Board "to make such [fair and reasonable mail] rates [as it fixes] effective from such date as it shall determine to be proper" does not work that result.

Read in its context, this language only empowered the Board to make its mail rate orders effective from the date a proceeding was instituted to change a rate. The Act's directions to the Board to "fix" "rates", to take into consideration the service "to be rendered," and the need for compensation "to insure the per-

formance" of such service, all become meaningless if the "make effective" clause relied upon by the petitioner permits the Board to refix a rate for a past period during which the prior rate fixed by the Board was in effect and unchallenged.

The legislative history of the "make effective" clause puts its meaning beyond doubt. At the time of the principal legislative hearings in connection with the Civil Aeronautics Act, the members of the Interstate Commerce Commission were in disagreement as to whether the Air Mail Act of 1934, as amended, authorized them to make their mail rate orders under the Act effective from the date a proceeding was instituted. This division of opinion on the Commission was echoed by witnesses and legislators at the hearings. The resolution of the disagreement was important because the mail rate provisions of the bills being considered were substantially identical to those of the Air Mail Act of 1934, as amended, in this respect. The spokesman for the air transport industry expounded at length the thesis that the Commission was empowered to make its rate orders effective from the date a proceeding was initiated rather than being restricted to making them effective only from the date on which they were issued. To clarify the situation he offered the "make effective" clause as an amendment, explaining that it was to preserve the "present authority" of the Commission.

The amendment was adopted by both the Senate and House committees. From that time on, the "make effective" clause remained in all the principal bills considered down to the enactment of the Act. The subsequent legislative proceedings clearly indicate that Congress not only adopted the amendment of the air transport industry spokesman but also his explanation of his amendment. The "make effective" clause means no more, therefore, than that the Board may make its mail rate orders effective prospectively from the date on which a proceeding is commenced.

The petitioner is quite wrong in stating that the issue upon which the Commission had divided was put at rest by the Act's imposition of a compulsory duty to carry the mails. Under the Act the obligation to carry the mail is voluntarily assumed by the carrier and, but for the "make effective clause", the basis for disagreement with respect to the power to fix rates as of the date of the application for a change would remain. Section 406 (a) (1) had no purpose other than to resolve this issue.

C.

The specific issue presented by this case has been presented to the Board on eight occasions in the past. In none of these cases did the Board exercise power to revise final rates "retroactively." Saving the question of its statutory authority to exercise such power, it declined to act

as a matter of "sound general policy" because its orders had to have finality. However, in no case did it reexamine the past period, and its "policy" never admitted of any exception. Since the Board's "policy" had never admitted of any exception, it concluded in this case to state unequivocally that the basis for its rule of inaction was its lack of power. These decisions, far from establishing the petitioner's proposition that the Board has acted consistently with its view, establish a consistent course of administrative conduct and afford a substantial reason for finding that the Board is lacking in authority to revise mail rates "retroactively."

The Board decisions upon which the petitioner relies involved various factual situations wholly unlike that in the case at bar. No instance has been cited, because there is none, in which the Board fixed a new mail rate applicable to a period during which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding. The Board, from its inception, has been primarily concerned with fixing final rates for the future. It cannot reasonably be assumed that the Board would expend time, effort, and money to fix future rates if it construed the statute as requiring it to replace all such determinations with the results taken from audits after carrier experience ceases to be a matter for estimate and becomes a known fact.

There are, to be sure, situations in which a rate order is made effective as of a date prior to its issuance. The direction of the "make effective" clause, for example, requires the Board to fix fair and reasonable amounts of compensation for limited periods back to the institution of proceedings. But such retroactive orders do not eliminate the rate-making method as the primary determinant of mail pay because they do not destroy the finality of previous orders, cover only the limited period of time necessary to determine a new rate, and are normally accompanied by the determination of a rate for an indefinite period in the future.

None of the incongruities envisaged by the petitioner have resulted from, or will follow upon, the Board's refusal to reimpose new rates on previously fixed final rates. Sudden changes in conditions caused by groundings, or other "catastrophes" are properly taken into account in fixing rates; neither the Board nor other public-utility regulatory agencies treat such risks as operating risks but rather as capital risks. The Board generally fixes a rate of return commensurate with the risks of the industry, and it matters not at all that a carrier has a petition on file when disaster strikes. Other changes in conditions which affect the adequacy of the return do not happen overnight, and the right of a carrier to petition for an increase, when circumstances re-

quire, is sufficient protection. The petitioner's suggestion that the Board's view can be brought to naught by a carrier practice of keeping "protective petitions" on file at all times is negated by experience which reveals few such "protective petitions", possibly because such a device subjects the carrier to recapture of excessive profits. Moreover, there is considerable doubt as to whether a paper filed the day after a rate has been fixed constitutes a "petition" within the meaning of Section 406 (a) (1).

D.

The Board's construction of the Act gives rise to no constitutional difficulties. In *United States v. New York Central R. Co.*, 279 U. S. 73, upon which the petitioner relies, this Court assumed that the Constitution does not require that rates be refixed for periods during which they stand without protest by the carrier. Moreover, there is no compulsion on the airlines to carry the mails equivalent to that in the Railway Mail Pay Act, involved in the *New York Central* case and upon the basis of which the Court suggested that unless rates were made effective as of the date of application for increase, serious constitutional questions might be raised.

The true measure of the airlines' constitutional rights under the Civil Aeronautics Act is the protection afforded public utilities by the Fifth

and Fourteenth Amendments. Like air mail carriers, public utilities perform repetitive services at rates normally predetermined, and they are subject to the same type of compulsion to render service. This Court has repeatedly held that the Constitution does not guarantee the reimbursement of losses incurred by public utilities prior to an application for a rate increase.

ARGUMENT

THE BOARD CANNOT FIX A NEW MAIL RATE TO BE EFFECTIVE DURING A PERIOD IN WHICH A FINAL RATE PREVIOUSLY FIXED BY THE BOARD WAS IN EFFECT AND UNCHALLENGED BY THE INITIATION OF A MAIL-RATE PROCEEDING

Introduction.—In its narrowest compass, this case raises the question whether the Civil Aeronautics Board is empowered to fix a new mail rate for petitioner for the period from January 1, 1946, to March 14, 1947. An affirmative answer to this question, however, will necessarily mean that all mail rate orders of the Board are subject to retroactive revision by the Board at any time, either upwards or downwards. Such a complete destruction of the finality of the Board's mail rate orders would constitute so sweeping a reversal in the administration and functioning of the mail rate provisions of the Act as to render meaningless the work of the Board in this field for the past ten years. The broad implications of this seemingly narrow issue

require, therefore, that it be subjected to a searching scrutiny.

Petitioner's claim is that Section 406 (a) (1) of the Civil Aeronautics Act, in granting to the Civil Aeronautics Board the power to make "rates effective from such date as it shall determine to be proper," conferred the authority to make a new rate order effective as of a time prior to the filing of the airline's petition to change an existing rate (Br. 3). While the question involved may be thus simply stated, the issue tendered by the petition is basic in the administration of the Act.

The statement by the court below of the alternatives which were open to the Congress which enacted the Civil Aeronautics Act is enlightening. In the course of its opinion, the court said (R. 113–114):

> There are at least two, and perhaps more, different schemes or plans possible in a system of payment for service such as this. The first is where a price per unit is fixed. In such an arrangement, the fixing of the price is customarily in advance; the contractor makes or loses as his economic skill permits, and he bears the risks of the operation. This is the method ordinarily employed by authorities in regulating the charges of public utilities. The word ordinarily used is "rates." The second general type, or plan, is where a net result of the operation, or of a unit

> thereof, is contemplated and provided for. In such an arrangement, advance payments may be made to the contractor but the final figure cannot be determined until the operation, or the controlling unit thereof, is complete; the net to the contractor is the same no matter what the quality of the performance may be, and he bears none of the risks of the operation. The so-called "cost-plus" contracts fall with this classification.
>
> We think that the scheme of the statute before us is of the former kind.

What petitioner really seeks from this Court is a declaration that Congress chose the latter alternative described by the court below, and that the Civil Aeronautics Act confers on the Board the power to superimpose, on rates validly and finally established, new rates which will compensate the airline for losses which it had suffered during the period preceding its application for a rate increase. Such a declaration would convert the Civil Aeronautics Act from an enactment establishing a system of future rate regulation into one which has set up machinery for the award of compensation for past services akin, as the court below stated, to that to which cost-plus contractors are entitled.

The difference between the petitioner and the Board is thus not with respect to the meaning of a narrow procedural provision; the issue is, rather, substantive and fundamental. The type

of regulatory system to which air lines carrying the mails are to be subjected depends upon this Court's answer to the question here presented.

Viewed in this perspective, the basic problem in this case and the materials upon the analysis of which depends its resolution, take on a wholly different color. It is the Board's view that the language of the Act and its legislative history deny the power which the petitioner seeks to attribute to the Board. It insists, moreover, that what might be wholly legitimate contrary readings of statutory language and quite rational contrary inferences from Congressional choice of phraseology were the question less basic, become entirely inadmissible when the question is properly appraised.[5]

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[5] This Court has so approached other cases. In *Chicago & Southern Air Lines* v. *Waterman S. S. Corp.*, 333 U. S. 103, 110, this Court held that an order of the Civil Aeronautics Board was not subject to judicial review notwithstanding the Court's statement that "it may be conceded that a literal reading of § 1006 [of the Civil Aeronautics Act] subjects this order to reexamination by the Courts. It also appears that the language was deliberately employed by Congress, although nothing indicates that Congress foresaw or intended the consequences ascribed to it by the decision of the Court below." Likewise in *United States* v. *New York Central R. Co.*, 279 U. S. 73, 79, this Court, in holding that the Interstate Commerce Commission had power to fix a railway mail rate back to the date of petition, stated that it was "quite aware that minutiae of expression may be found that show Congress to have been thinking of the future," and that "we put our decision not on any specific phrase, but on the reasonable implication of an authority to change the rates of pay which existed from the day the application was filed. * * *."

That being so, the meaning of Section 406 (a) (1) is to be gleaned not from a mere textual analysis of its language but from a proper understanding of the entire Act, its history and its purposes. In Point A, therefore, we shall show that Congress, when it enacted the Civil Aeronautics Act, contemplated a typical rate regulatory scheme, not a method for determining compensation for past services. We shall, in this part of our argument, also show that the petitioner's interpretation of Section 406 (a) (1) is flatly inconsistent with the statutory scheme and that, that being so, Section 406 (a) (1) cannot be read as accomplishing in one phrase in a subsection of a detailed and complicated legislative enactment what Congress studiously and purposefully avoided doing in the Act as a whole.

In that light, we proceed, in Point B, to analyze the language of Section 406 (a) (1) in its context and to examine its legislative history to show that it affords nothing like the clear mandate which would be necessary to upset what is plainly the Congressional purpose. We shall show, on the contrary, that the legislative history makes crystal clear that Congress did not intend to confer on the Board the power for which petitioner contends. That the Board's administrative practice fully supports the conclusion it reached in this case and produces no incongruous results will be demonstrated in Point C. And, finally, in Point

D, we shall show that the Board's view does not render the Act vulnerable to a charge of constitutional invalidity.

A. SECTION 406 OF THE CIVIL AERONAUTICS ACT ESTABLISHES A SYSTEM FOR THE REGULATION OF FUTURE RATES, NOT MACHINERY FOR THE AWARD OF COMPENSATION FOR THE PAST

1. *The origins and the language of the Act show that it establishes a public utility rate-making pattern.*—Consciously modeled after the Interstate Commerce Act (24 Stat. 379, as amended, 49 U. S. C. 1, *et seq.*), the Motor Carrier Act of 1935 (49 Stat. 543, 49 U. S. C. 301, *et seq.*) and the Air Mail Act of 1934 (48 Stat. 933),[6] the Civil Aeronautics Act of 1938 provides for comprehensive regulation of the economic and safety aspects of the air transport industry.[7] Testimony at the hearings on the bills which formed the basis for the Act was almost unanimous in requesting the establishment of a regulatory scheme that would afford relief and

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[6] For a summary of portions of the legislative history of the Act supporting this conclusion see Rhyne, *The Civil Aeronautics Act Annotated* (1939), p. xiii, note f: see also note 11, *infra*.

[7] The Act as originally enacted conferred certain functions on the Authority. The functions of the Authority in connection with, *inter alia*, rates for the transportation by air carriers of persons, property, and mail were transferred to the Civil Aeronautics Board by Reorganization Plan No. IV, which took effect June 30, 1940 (54 Stat. 1235; 5 F. R. 2421). Accordingly, the term "Board" should be substituted for "Authority" in all references thereto.

protection along the lines customarily accorded to public utilities. Thus, witnesses before the Congressional committees, making frequent references to legislative controls over railroad, motor carriers and even to electric utilities,[8] advocated the use of certificates of public convenience and necessity, the regulation of passenger and property rates to prevent cut-throat competition, the protection of routes, safety regulation, labor regulation, control of mergers, etc.[9] The President of the Air Transport Association, and acknowledged spokesman for the air transport industry, Edgar S. Gorrell, testified that:

> The bill before you is more or less the usual form of American regulation of

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[8] *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5234 and H. R. 4652*, 75th Cong., 1st Sess., pp. 39, 46–48, 66, 76; *Hearings before Subcommittee of Senate Interstate Commerce Committee on S. 2 and S. 1760*, 75th Cong., 1st Sess., pp. 493, 310.

[9] *House Hearings*, note 8, *supra*, pp. 26–27, 39, 40, 46–47, 66, 67, 68–74, 167–214; *Senate Hearings*, note 8, *supra*, pp. 51–64, 310, 376–377, 467, 493. A more generalized view was expressed by a representative of the National Association of Railroad and Utilities Commissioners: "It is the view of our association that any important public-utility industry requires regulation in the public interest and will be regulated sooner or later, and that the full purpose of regulation can best be accomplished only by regulation from the beginning of the development of the industry" (*House Hearings*, note 8, *supra*, p. 163). This witness urged further that losses and wastes from open competition could be avoided: "* * * if the Congress shall at this time provide for the character of regulation which is now being given to other public utility enterprises." *Id.* at 164.

> utilities or transportation and embraces the points which are common to all such types of legislation.[10]

It is not surprising, therefore, that the provisions of the Act bear a striking similarity to the provisions of other Federal laws regulating different parts of the transportation industry[11] and public utility statutes generally.[12]

The petitioner concedes that the authority granted to the Board to "determine and pre-

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[10] *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 9738*, 75th Cong., 3d Sess., p. 297.

[11] Commissioner Eastman testified (*Senate Hearings*, note 8, *supra*, p. 70): "Now, these two bills you have before you follow the usual pattern of regulatory bills. And you will find that much of the language is similar to language which is now already in the law with reference to railroads or with reference to motor carriers." In the same vein, the President of the Air Transport Association, Edgar S. Gorrell, testified (*House Hearings*, note 8, *supra*, p. 264): "H. R. 5234 [an early form of the bill which became the Civil Aeronautics Act] is, in many instances, a Chinese copy of Parts I and II [of the Interstate Commerce Act]."

"In general the new Act followed the regulatory pattern of the Interstate Commerce Act, particularly Part II thereof, comprising the Motor Carrier Act of 1935. Many provisions were taken over substantially verbatim." Ballard, *Federal Regulation of Aviation* (1947) 60 Harv. L. Rev. 1235, 1257.

[12] See, for example *McKinney's Consolidated Laws for New York, Annotated*, Book 47 (Public Service Law), Section 49. Cf. Section 406 (a) and (b) of the Act relating to mail rates (*supra*, pp. 2–4) and Section 1002 (d) and (e) relating to rates for the carriage of persons and property. *Infra*, pp. 105–106.

scribe" "just and reasonable * * * rates" for the carriage of persons and property (Sections 404 (a) and 1002 (d)) is typical of a public utility rate-making authority and inconsistent with any power to make adjustments retroactively for unanticipated losses or unexpected excessive profits (Br. 35). It contends, however, that the Board's power with respect to establishing compensation for carrying mail is of quite a different sort. Although Section 406 (a) authorizes the Board to "fix and determine" "fair and reasonable rates" for the carriage of mail, the petitioner asserts that the standards for determining mail rates are so different from those for determining rates for the carriage of persons and property as to make inapposite rules for the fixing of typical public utility rates (Br. 37–46).

That assertion may be tested by a comparison of the standards made applicable by the Act for the fixing of rates for the carriage of persons and property and rates governing mail transportation:

Standards for Fixing Rates for the Carriage of Persons and Property (Section 1002 (e))	*Comparable Standards for Fixing Rates for the Carriage of Mail* (Section 406 (b)) [13]
"(1) The effect of such rates upon the movement of traffic;	(1) No comparable standard. (See note 18 *infra*, p. 28.)
"(2) The need in the public interest [14] of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;	(2) "The need of each such air carrier for compensation * * * sufficient * * * to enable [them] * * * to maintain and continuet he development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense."
"(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;	"(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;" [15]
"(4) The inherent advantages of transportation by aircraft; and	(4) "The conditions peculiar to transportation by aircraft."
"(5) The need of each air carrier for revenue sufficient to enable such air carrier under honest, economical, and efficient management, to provide adequate and efficient air carrier service." [16]	(5) "The need of such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service."

[13] The full text of section 406 (b) is set forth *supra*, pp. 3–4.

[14] "Public interest" is defined, in Section 2 of the Act (49 U. S. C. 402), to include—

"(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense."

[15] Section 406 (b) has an additional standard which is really included within the standard quoted in the text. The additional standard is:

(Footnote 15 continued on p. 27.)

[16] See p. 27.

This comparison reveals that, with but one possible exception which we shall now proceed to discuss, the Act embodies substantially the same rate-making method and the same rate-making standards for determining the compensation to be received by air carriers for carrying persons and property and for carrying mail.

2. *The developmental aspects of the Act are consistent with a public utility rate-making pattern.*—The rate-making standards applicable in fixing mail rates differ principally from those typically applied in that the last clause of Section 406 (b) provides that the mail rates fixed by the Board shall be high enough so that the revenue expected to be derived therefrom and from all other sources will permit an air carrier to meet its anticipated costs of operation under "honest, economical, and efficient management" and to earn a return calculated to enable it to "maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." [17]

"The condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail * * *."

[16] These provisions are substantially identical to the provisions of Section 216 (i) of the Motor Carrier Act of 1935 (49 Stat. 543, 558, 49 U. S. C. 316 (i)) applicable to common carriers by motor vehicle. Cf. Sharfman, *The Interstate Commerce Commission*, Pt. IV (1937), pp. 414–420.

[17] See note 3, *supra*, and the authorities cited therein.

This is the so-called "subsidy" provision of the Act.[18] As will appear, it does not change the rate-making method for determining mail pay.

The legislative history of the Act emphasizes what is plain from the language of the Act, and its origins, namely, that the mail pay provision was to be administered by a "rate" technique and that the needs of the commerce of the United States, the Postal Service, and the national defense were not to be met by direct subsidies but, rather, that these needs were additional elements to be considered in fixing "fair and reasonable rates" for the carriage of mail. Although the Federal Aviation Commission had recommended that mail rates should be compensatory for the service rendered and that subsidies should be

[18] The reason why the last clause of Section 406 (b) is sometimes called a "subsidy" provision is that it relates to the fixing of mail rates, rates which are only applicable to a single customer, the United States. Since it is no longer the policy of the United States to confine air-mail payments to air-mail revenues, as was true under Section 6 (e) of the Air Mail Act of 1934 (48 Stat. 933, 936), it is evident that the higher mail rates are fixed the higher will be the revenues of the carriers therefrom. With other types of traffic, rate increases may result in lower revenues caused by a decline in the volume of traffic which will be offered at the higher rates (*cf.* Section 1002 (e) (1) of the Act, *supra*, p. 26). It is the inapplicability of the usual economic limitation on a rate, namely, the ability of traffic to pay, which makes this standard particularly beneficial to carriers in the fixing of mail rates and results in the standard being called a "subsidy" provision. Notwithstanding the results obtained, mail compensation is determined through the rate-making process.

paid separately," the bills subsequently considered by Congress did not so provide. Thus, the president of the Air Transport Association, Edgar S. Gorrell, testified:

> There are only two ways whereby the necessary capital can be provided to this industry. One is the way toward which the governments of foreign lands increasingly tend—the way of mounting governmental subsidies, whereby public funds are poured without stint into air transport. The other way is the traditional American way, a way which invites the confidence of the investing public by providing a basic economic charter that promises the hope of stability and security, and orderly and intelligent growth under watchful government supervision.
>
> It is the second way, the traditional American way, which is here proposed.[20]

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[19] *Report of the Federal Aviation Commission*, Sen. Doc. No. 15 (74th Cong., 1st Sess.), pp. 49–51. The Commission's recommendation number (3) was stated as follows:

"The carriage of mail should be put on a commercial basis, with payments to lines within the amount received by the Post Office. Whatever additional sums are for the time being necessary to maintain and develop adequate transport services should be allocated specifically to that purpose by the government."

[20] *Hearings before a subcommittee of the Senate Committee on Interstate Commerce on S. 3659* (75th Cong., 3d Sess.), p. 31; see also p. 21, and *House Hearings*, note 10, *supra*, p. 251, and pp. 75, 76, 121, 169, 337–8, 339, 465, 468 and *House Hearings*, note 8, *supra*, pp. 36, 79, 151, 243, 244, 308.

Early in the hearings, Commissioner Eastman pointed out the similarity between the problem of fixing mail compensation for air carriers and fixing railroad rates. He stated:

> Whether that [Sections 304 (c) and 310 (f) of H. R. 5234] is to be regarded as a subsidy or not, I am not sure. As a matter of fact, it is much like the situation with respect to the railroads. There the most important part of the service is the freight service * * * they have frequently argued to the Commission that it is impossible for them to get a fair return on the passenger business and therefore the freight must carry that load, if they are to get the fair return * * * the situation is much the same here * * * If it should be the situation that for competitive and other reasons the passenger part of the business cannot be made to pay its way, then it follows that the companies cannot operate successfully from a financial point of view unless they get enough from carrying the mail to cover the deficiency on passengers.[21]

This analogy to rate-making for the railroads, which was already embodied in the bills before Congress, was emphasized by the spokesman for the air-transport industry, Mr. Gorrell:

> Before leaving the subject of mail compensation, I want to refer briefly to the question of considerations involved in fixing compen-

[21] *House Hearings*, note 8, *supra*, p. 36.

sation. The fundamental consideration in fixing mail, passenger, express, and freight rates is, of course, that there should be a return to the carrier which will give it enough revenue to keep going under economic management. This consideration is operative with respect to every form of transportation and is, indeed, the task of the whole question of rate regulation of any public utility. In a sense, the problem of fixing rates for particular classes of traffic by a regulatory agency resolves itself into determining what share of the total return necessary to the carrier should be borne by each particular class of traffic.

As Commissioner Eastman pointed out to this committee, such a consideration has, in fact, been dealt with in the case of regulating certain freight rates for the railroads. Thus, in the last analysis, the problem is to determine what the carrier should ultimately receive from all sources and then to allocate the burden among the various classes of traffic, including the mail, as may be justified in the public interest.[22]

[22] *Senate Hearings*, note 8, *supra*, p. 438; see also p. 497. Similar statements were made by this witness to the House Committee: "The end in view is, of course, a reasonable return to the carrier, under economical management, so that it can continue in service. That return is to be secured as a whole from various classes of traffic, including mail. The division of the burden between these classes must depend upon many factors, including the ability of each class to pay, the relative importance of each class, the constancy of demand, the facilities that have to be devoted because of the

The brief and unequivocal reports of the Congressional committees handling the bills, which were enacted into law without material changes in this respect, make it abundantly clear that the Congress adopted this view and adhered to the customary concepts of public utility rate regulation.[23]

The statutory requirement that "the needs of the * * * commerce of the United States, of the Postal Service, and of the national defense" be taken into account is not unique to the Civil Aeronautics Act. A similar statement is found in the Motor Carrier Act of 1935 (49 Stat. 543) and identical language was inserted into the Interstate Commerce Act by the Transportation Act

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peculiar demands of each class, and so on." *House Hearings*, note 8, *supra*, p. 317. Again, "* * * the rate-making body should * * * take into consideration the need for producing total revenues that will give a fair return. That need is fundamental to rate-making, and consideration of it is particularly applicable to fixing rates for mail transportation where there is only a single customer and where the commodity transported, the mail, cannot be readily compared, in terms of dollar value or otherwise, with other traffic" (*Id.* at p. 339).

[23] The Senate Committee reported: "The recognized and accepted principles of the regulation of public utilities, as applied to other forms of transportation, have been incorporated in S. 3845" (S. Rep. No. 1661) (to accompany S. 3845), 75th Cong., 3rd Sess., p. 2). The House Committee reported: "[the Board] would have the power to * * * fix rates for the carriage of passengers, property, and mail * * *." (H. Rep. No. 2254) (to accompany H. R. 9738), 75th Cong., 3rd Sess., p. 3). See also H. Rep. No. 2635, Conference Report to accompany S. 3845), 75th Cong., 3rd Sess., pp. 71–72.

of 1940.[24] And yet no one has ever contended that this statement of the "national transportation policy" caused the Interstate Commerce Act to cease to be a rate regulatory statute in a typical sense.

3. *A public utility rate-making pattern such as is established by the Act provides for future rates which have the attribute of finality.*—The assumption of power by the Board to determine compensation for the transportation of mail by aircraft during a period in which a final rate previously fixed by the Board was in effect and

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[24] The Transportation Act of 1940, c. 722, Title I, § 1 (54 Stat. 899) amended the Interstate Commerce Act by inserting a new paragraph entitled "National Transportation Policy" before Part I of the Act. It reads as follows:

"It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; *all to the end of developing, coordinating and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" [Italics supplied.]

unchallenged by the initiation of a mail-rate proceeding is wholly inconsistent with the well-developed rate-making pattern of the statute. It being plain that Congress, in the Civil Aeronautics Act, adopted the usual public utility method for the fixing of mail transportation rates, the petitioner's view as to the power of the Board must be measured against the principles which govern public utility rate regulation.

Under the usual public utility rate-making method, the rate-making authority does not fix the income of the utility but only the rate it is to receive in the future for the sale of services, such rate being calculated to produce gross income for the utility sufficient to meet such necessary and allowable expenditures as are anticipated and a return which will satisfy statutory standards and be non-confiscatory in the constitutional sense. Such rates deal with the future and are not normally concerned with reimbursement of past losses. They are not subject to revision with respect to completed transactions but are final. Such rates afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned.

If the rate-making authority "sets too low a rate, the carrier has no redress save a new hearing and the fixing of a more adequate rate for the future." *Arizona Grocery* v. *Atchison Ry.*, 284

U. S. 370, 387. Thus, this Court has refused to require the capitalization of past losses in the rate base for the purpose of fixing future rates,[25] or the current reimbursement out of new rates of deficiencies arising from a failure to earn a reasonable return in past years,[26] or the capitalization of costs of maintaining excess capacity during the early period of operation.[27] Through Chief Justice Stone, this Court has stated:

> * * * But regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding

[25] *Galveston Electric Company* v. *City of Galveston, et al.*, 258 U. S. 388.

[26] *Georgia Railway and Power Company, et al.* v. *Railroad Commission*, 262 U. S. 625, affirming 278 Fed. 242 (N. D. Ga.) where the district court stated at p. 247: "The claim that the failure to earn a reasonable return, if established, should now be either allowed as capital investment or amortized under this or future rates we cannot allow. * * * A rate established as reasonable, whether by the company or by the commission, is not guaranteed by the commission or the public. Whether it will actually yield more or less than a fair return during its continuance is a risk of the business. We do not deny that it is within the discretion of the commission to consider the experience of the immediate past in fixing a just rate for the future, but we hold that no legal right exists to have disappointments or surprises in results balanced."

[27] *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, 315 U. S. 575.

> them to the rate base * * *. The deficiency may not thus be added to the rate base, for the obvious reason that the hazard that property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated, business.[28]

These rules are applicable equally to mail, passenger and property rates under the Act. This "rate" pattern was well established for public utilities, particularly in the transportation industry, when the Act was passed; it is a pattern that was fully elucidated before the Congressional committees considering regulation of the air-transport industry; it is a pattern that was plainly specified in the Act; and it is a pattern that has been consistently followed by the Board in its administration of the mail-rate provisions of the Act.

Petitioner's arguments in support of the proposition that "the Court of Appeals relied on a false analogy to public utility rate statutes" (Br. 27–44) are totally irrelevant to the issue. The Court of Appeals (R. 114), like the Board (R. 67–70), reasoned (1) that Section 406 was intentionally cast in the form of a "usual public

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[28] *Id.* at p. 590. Conversely, it is well established that a regulated utility cannot be required to give up excess earnings from past operations. *Board of Public Utility Commissioners, et al.* v. *New York Telephone Company*, 271 U. S. 23, 31–32; *Newton* v. *Consolidated Gas Company of New Jersey*, 258 U. S. 165.

utility rate-determination measure"; (2) that rates under such measures were primarily future rates and were final; and (3) therefore, the rates determined under Section 406 were of such character. In reaching its conclusion, the Court of Appeals did not assert the view that carrying mails is a "pubic utility function" (Br. 29–30), or that it was impractical to adjust mail rates "retroactively" as was true in the case of other public utility rates (Br. 33–37). At most, petitioner's arguments are reasons which might have been presented to Congress as to why Congress might have legislated differently than it did. They furnish no basis, however, for construing the Act.

Likewise, it is of little significance that Congress has the power to increase mail rates "retroactively" (Br. 13–16). That may be conceded (R. 86). The question is not what Congress might have done but what it did. Of this the Act and its legislative history leave no doubt; Congress established a public utility rate-making pattern for the determination of compensation for carrying mail by air. Indeed, the failure of Congress to provide for retroactivity in the Act in the same clear terms that it did in the statutes cited by TWA (Br. 13–16), and others (note 34, *infra*), is convincing evidence that it had no intention of doing so.

4. *Acceptance of petitioner's contention would thwart the congressional purpose.*—The facts of

this very case serve to highlight the dichotomy between the public utility regulatory pattern discerned by the Board and the court below in the Act and the petitioner's view of the mail rate provisions as authorizing compensation awards. In the course of the proceeding which TWA now seeks to nullify, the Board, as stated above, p. 5, prepared and introduced into the record of the proceeding indices of selected operating statistics for the future, and estimates of operating results and investment requirements for the future. On the basis of such materials and with a (6 C. A. B. 601–602)

> purpose to fix a service mail rate which will be high enough to provide reasonable security against the risks inherent in the dynamic and uncharted transitional period ahead and which at the same time will be low enough to provide a strong competitive incentive for economical and efficient management,

the Board concluded "that a mail rate of 45 cents per ton-mile is required." *Ibid.* Although its decision applies in part to a past period,[29] nothing could be plainer than that the Board was primarily concerned with the future effect of its order, which it considered to be final and

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[29] The Board's order, issued on October 26, 1945, was made effective as of January 1, 1945, the date a show cause order was issued proposing to reduce TWA's rate from 60 to 32 cents. This was in accordance with the Board's usual practice. See *infra*, p. 83.

binding. This is put beyond doubt by the Board's estimate, that on the basis of the mail rates it fixed, TWA would secure a return of 13.77 per cent, after taxes, on the total investment required for its entire domestic common carrier operations. Such a high rate of return is wholly inconsistent with the lack of risk involved in the petitioner's view that the Board is required to guarantee fair and reasonable amounts of mail compensation by the device of "retroactive" rate orders. And yet, the petitioner accepted the rates according it this return and, more significantly, the theory of regulation which those rates embodied. It cannot now urge, consistently, that the ground should once again be retraced and a compensation *award* be substituted for the rates designed, without objection by TWA, to provide reasonable security and yet assure "strong competitive incentive for economical and efficient management."

a. *The rate-making pattern would be destroyed.*—If the petitioner's view of the Board's power were accepted, the rate-making method for the determination of mail pay prescribed by the Act would be completely eliminated and a cost-plus auditing system substituted. Petitioner urges that the "make effective" clause in Section 406 (a) (1) permits the Board to make a new "rate" effective during a past period in which a previously determined rate was in effect and unchallenged by the initiation of a rate proceeding

(Br. 11–24). If this were true, the Board would not merely be permitted, but would be required, to take such action. While Section 406 (a) (1) merely requires the Board to make the fair and reasonable rate it fixes effective from such date as it "determines to be proper," if that provision is to be read as the petitioner reads it, the most obvious determinant of the propriety of the effective date of an order is whether or not the "rate" was "fair and reasonable" from such date (Br. 28–29). The Board, then, would necessarily be determining the fairness and reasonableness of the return to the carrier during a *past period* rather than the fairness and reasonableness of a *rate* for a carrier in the *future*. While the petitioner repeatedly insists that its contentions go only to the power of the Board and not its exercise (Br. 3, 10, 17, 74), its assertion that both the statute (Br. 40, 77, 81, 83) and the Constitution require (Br. 11, 80) that the airline be assured of a fair and reasonable *amount* of mail compensation at all times demonstrates that what the petitioner really seeks is a declaration that the Board must, in all cases, audit a carrier's books for a past period and award mail compensation sufficient to cover proper costs and a reasonable rate of return instead of fixing fair and reasonable rates for the carriage of mail for the future. So to hold would completely destroy the finality

of the Board's forward-looking rate orders and make all such orders merely tentative.[30]

b. *Achievement of the objectives of the Act would be impaired.*—This system of cost plus auditing to determine mail compensation would, if recognized, impede the accomplishment of the very objective the Act is designed to achieve, namely, the encouragement and development of a self-sufficient air transport system.[31]

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[30] The court below also made reference to the presumption against retroactivity. (R. 112, 113.) TWA's brief urges that this presumption is applicable only where a statute is applied to a period prior to its enactment (Br. 25–27). TWA's argument misses the court's point. Obviously the court was not laboring under the misapprehension that this Act applied to events prior to its enactment. The court was simply drawing an analogy between the uncertainty created by such a statute and the uncertainty created by TWA's interpretation of this statute. The hostility of the law to retroactivity is merely a judicial recognition of the desirability of finality and certainty. Cf. *Arizona Grocery* v. *Atchison Ry.*, 284 U. S. 370, 389.

[31] See Sections 2 and 406 (b) of the Act. (*Infra*, pp. 100–101, and *supra*, pp. 3–4.) In the *First Annual Report of the Civil Aeronautics Authority* [Board] (1939), p. 21, it was stated:

"This administration of the act necessarily involves a policy of rate determination which serves to recognize managerial efficiency and to permit benefit therefrom to redound to the carriers, thus providing an incentive to management for further development while at the same time discouraging inefficient management by refusing, in fixing air-mail rates, to allow any of the costs incident thereto. Accordingly, the Authority [Board] has analyzed both past and forecast operating revenues and expenses of the air carrier in each proceeding in the light of the statutory test of 'honest, economical, and efficient management,' not for the purpose

First, if the Board were required to use a system of cost-plus auditing to reimburse carriers for past losses then, under the same system, it would have to recapture excessive profits earned in the past. As a result, carriers could never be certain that they could keep earnings from the carriage of mail. This would have two deleterious effects on the achievement of the objectives of the Act. It would remove all incentive toward managerial efficiency and the development of nonmail revenues since, as profits arose therefrom, mail payments would tend to become excessive and subject to recapture. Further, the possibility of recapture of excessive profits for carrying mail in past years would write a question mark across the financial statements of carriers and seriously impair their ability to raise private capital for expansion, new equipment and other needs essential to the development of a self-sufficient air transport system. This is one of the principal reasons why the court below concluded that the Board had no power to revise rates retroactively in this case (R. 114–115).

TWA suggests, however, that there is "nothing to fear" in recapture. Assuming, it states, that

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of invading proper managerial discretion but with the object of encouraging a progressive, efficient management which will be characterized by a constant effort to increase commercial revenues, thereby resulting in the attainment of an increasing measure of commercial self-sufficiency."

an airline "earns an unconscionably high profit from its mail pay" and "that the airline has made no disbursements and undertaken no commitments on the faith of that profit", why shouldn't the Board recapture? (Br. 77–80). While this hypothetical situation may be an intriguing possibility, it hardly squares with business reality. What business would earn very high profits and undertake "no commitments" of its funds? Common business practice is to commit such profits to the enterprise or declare a dividend. If the Board could only recapture when an airline had never "changed its position", it could in fact never recapture at all. The mail pay provisions would be administered not with "even-handed justice" but with open-handed injustice. It is far more likely that the Board would be required to recapture irrespective of the commitments made by carriers. The effect of such recapture would be industry-wide disruption. Whether or not the Board finally recaptures excess earnings in a given case, there will always be uncertainty as to what its action may be. So far as the effectuation of the policies of the Act is concerned, the vice of the situation lies in the existence of the power as much as in its exercise, for its mere existence gives rise to uncertainty.

Second, if petitioner's view were to prevail, one of the basic techniques for assuring efficient operation, namely, the fixing of uniform rates for

carriers with similar operating characteristics,[32] would lose much of its effectiveness as a means of furthering the policy of the Act to develop a sound air transport system through competition.[33] Section 406 (b) authorizes the Board to fix rates for "classes of carriers." The uniform rate is an important regulatory device to force carriers within a given class to compete in the development of revenue and control of costs. If the basic operating characteristics of the carriers are similar, a uniform rate for a class of carriers can have an important effect in stimulating good competitive performance. Under the cost-plus system of auditing which TWA reads into the Act, a carrier could always seek relief from the uniform rate and would, therefore, have no incentive to live within it.

If the interpretation of the Civil Aeronautics Act urged by TWA is correct, Congress gave the Board a blank check and authorized it to guarantee the airline industry for an unlimited time against all losses assuming only that there was economical management. A guarantee of an entire industry against loss could rest only upon the most specific language from which that intention

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[32] For examples of the use of this technique, see the cases cited in notes 1 and 2 of the Board's opinion in this case, fixing uniform service rates for the "Big Four" carriers and the "Little Six" carriers (R. 64).

[33] Section 2 (d) of the Act (Appendix, *infra*, p. 101).

would be clear beyond the shadow of a doubt. There is no such language in the Act. So radical and unprecedented a departure would certainly have been the occasion of considerable discussion among legislators. There is no such discussion in the legislative history. The clarity with which Congress, in other situations, has granted much more limited power to "recapture" excessive earnings or retroactively increase "rates" when that has been its intention,[34] leads to the conclusion that "retroactive" power to determine mail compensation and the power to "recapture" excessive earnings, both of which powers TWA asserts are possesed by the Board, should not be thrust upon the Board without a clearer sanction from the Congress. What Congress did clearly provide was a typical public utility regulatory plan whereby air carriers were entitled to receive final future mail rates which offered a genuine opportunity to earn profits from air carrier operations as a whole.

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[34] Transportation Act of 1920 (Act of February 28, 1920, c. 91), 41 Stat. 456, Tit. IV, § 422, 41 Stat. 488–491; Merchant Marine Act of 1936 (Act of June 29, 1936), c. 858, 49 Stat. 1985, Tit. V, § 505 (b) (49 Stat. 1998), Tit. VI, § 603 (c) (49 Stat. 2002); Renegotiation Act (Act of April 28, 1942, c. 247, Tit. IV, § 403 (56 Stat. 245), as amended, 50 U. S. C. App. 1191; see also the examples cited by TWA (Br. 13–16).

B. SECTION 406 (A) (1) WAS INTENDED ONLY TO EMPOWER THE BOARD TO MAKE RATE ORDERS EFFECTIVE AS OF THE INSTITUTION OF THE RATE PROCEEDING

We have already shown that the Act establishes a public utility rate-making pattern for the determination of compensation for carrying mail by air, and that, under this plan, mail pay is determined primarily by fixing *rates* of compensation for *future* services. TWA attempts to pervert this pattern into a cost-plus scheme of pricing whereby a carrier's books will be post audited and it will be awarded fair and reasonable *amounts* of compensation for services rendered in the *past*. It seeks to achieve this result solely by reference to the "make effective" clause of Section 406 (a) (1) of the Act, which empowers the Board "to make such [fair and reasonable mail] rates [as it fixes] effective from such date as it shall determine to be proper." (Br. 9, 16). It is questionable whether the burden of nullifying the pattern of the Act could be sustained on the basis of the "make effective" clause alone even if it could more readily be construed to mean, as TWA contends, that the Board can make its mail rate orders effective at any time. In any event, when the clause is read in the context of Section 406, and particularly in the light of its legislative history, it is clear that its purpose and meaning was neither to "empower" nor "direct" the Board to make its mail rate orders effective "ret-

roactively," thus destroying the carefully nurtured pattern of the Act, but simply to make its mail rate orders effective from the date a proceeding was instituted to change a rate, a procedure wholly consonant with the pattern of the Act.

1. *The language of Section 406.*—Many of the words and phrases used in Section 406 point to the necessity for interpreting the Act as the Board and the Court of Appeals did. The directions of Section 406 (a) (1) to "fix" "fair and reasonable *rates*" for carrying mail, "the facilities used and useful therefor, and the services connected therewith"; (2) "to prescribe the method or methods, by aircraft-mile, pound-mile, weight, space, or any combination thereof, or otherwise, for ascertaining such rates"; (3) to fix rates upon "petition of * * * an air carrier"; (4) to do so only "after notice and hearing"; and (5) to determine rates upon the basis of the standards specified, are cast in the form, and use the language, of traditional public utility regulatory measures. Fair and reasonable rates fixed by such measures, as the Court of Appeals found (R. 114), and TWA concedes (Br. 35), "look to the future." Effect may be given to the foregoing language of Section 406, therefore, only if the concept of future rates is preserved through the interpretation adopted by the Board and the Court of Appeals. TWA attempts to reconcile

the use of the word "rates" in Section 406 with its interpretation of the "make effective" clause by arguing that "rates" is "traditional mail pay language" (Br. 28–33). However, this argument ignores the accompanying language in Section 406, which is public utility rate-making language, and the clear intention of Congress to establish a typical public utility regulatory measure.

That the word "rates" as used in Section 406 (a) and (b), and even in the "make effective" clause itself, refers to a measure of payment for future operations is borne out by some of the language of Section 406 (b), which in itself limits, or else conflicts with, the asserted plain meaning of the "make effective" clause. Thus, Section 406 (b) requires the Board, in fixing rates under Section 406 (a), to take into consideration among other factors "such standards reflecting the character and quality of service *to be rendered* by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to *insure the performance* of such service." [Italics supplied.] The portions of the above quotation which we have emphasized demonstrate that the rates the Board is to fix are to apply to future operations. Moreover, if these words are to be given content they must limit or else conflict with the asserted meaning of the "make effective" clause, for what is to

happen in the future is hardly a proper consideration for determining the extent of payment for past services.

The basic directive to the Board in Section 406 (a) is to "fix and determine from time to time * * * fair and reasonable rates." The well understood meaning of "fix" is "to settle," "make permanent," "make certain." But if, as the petitioner urges, the "make effective" clause were construed to grant the Board authority to refix a rate for a period for which a prior rate fixed by the Board was in effect without challenge, the Board would in fact never "fix" a rate but would only make tentative determinations. It is impossible to consider a rate as fixed if at any time thereafter it can be revised. It is clear, therefore, that "fix" cannot be given its normal meaning if the "make effective" clause is given the construction which TWA asserts is plain.

The use of the word "such" in the "make effective" clause is also significant. It establishes that the clause is not to confer any new or independent substantive authority to fix and de-

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* * * its [fix] ordinary meaning is to make permanent something that is unsettled.'" *Kendall* v. *Stafford*, 178 N. C. 461, 466 (1919); "To make firm, stable, or fast; * * * to set or place definitely; to establish; station; settle; * * * to asign precisely * * *." Webster's *New International Dictionary* (2d ed., 1938), p. 958.

termine mail rates, but only to deal with "such rates" as have been fixed; and even then, only to deal with "such rates" in one of their procedural aspects. To construe the clause so as to require the Board to insure a carrier a fair and reasonable amount of compensation at all times, as TWA does, nullifies the word "such" and creates a wholly new concept of compensation without statutory justification.

It was on the basis of considerations like these that the court below concluded that: "The language of the disputed clause is not necessarily retroactive. It is as apt in reference to the future as it is to the past" (R. 113), and "We think that anyone reading the whole of the statutory provisions relative to these rates [Section 406] must conclude that they specify the fixing of a rate, or rates, for the carrying of a physical unit of mail, and that they contemplate future operation" (R. 114).

While a keyhole view of Section 406, including the "make effective" clause, limited to the dictionary meanings of the words employed would sustain the conclusion of the Board and the Court of Appeals, it might leave uncertainty as to whether effect were being given to the intentions of Congress. Any such uncertainty, however, is completely dispelled by the legislative history of the "make effective" clause to which we now turn.

2. *The legislative history.*—After considering the materials set forth below, the Court of Appeals concluded "that the addition to the original bills of the 'make effective' clause appears to have been designed to establish in the Board the same powers which had theretofore existed at (sic) the Interstate Commerce Commission in respect to railway mail. And it had been established that the Interstate Commerce Commission could make its orders effective as of the date of the beginning of the proceedings; but it had never been claimed that the Interstate Commerce Commission had unfettered retroactive power" (R. 113). These conclusions are amply supported.

In none of the 18 mail-rate cases decided by the Interstate Commerce Commission under the Railway Mail Pay Act[36] prior to the passage of the Civil Aeronautics Act did the Commission refix a rate to be effective during a period prior to the initiation of a rate proceeding (R. 71); in most of them, however, the Commission made its order effective as of the date the proceeding was initiated.[37] Most significantly, in *Railway*

[36] Act of July 28, 1916, Sec. 5, c. 261, 39 Stat. 412, 429, 39 U. S. C. 542. This provision is substantially the same as Section 406 (a) (1) of the Civil Aeronautics Act of 1938, except that the last clause differs from the "make effective" clause of Section 406 (a) (1).

[37] See, for example, *Railway Mail Pay*, 216 I. C. C. 467 (1936); *Railway Mail Pay*, 185 I. C. C. 715, 720 (1932); *Railway Mail Pay*, 151 I. C. C. 734 (1929).

Mail Pay, 144 I. C. C. 675 (1928), the Commission refused to make higher rates for some carriers effective prior to the date they were brought into the proceeding although it found that their rates had become less than fair and reasonable before that date. In one of these railway mail pay cases, the Postmaster General questioned the right of the Commission to make its order effective as of the date the rate proceeding was initiated rather than upon the issuance of the order. The resulting litigation culminated in the decision in *United States* v. *New York Central R. Co.*, 279 U. S. 73. This Court there held that the Commission could make its mail-rate orders effective from the date proceedings were initiated. It stated (279 U. S. at 78–79):

> We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint. * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid from the moment when the application is filed. * * * the necessary investigation takes a long time, in these cases years; but reasonable compensation for the years thus occupied is a constitutional right of the companies no less than it is for the future. * * * We put our decision not on any specific phrase, but on the reasonable implication of an

> authority to change the rates of pay which existed from the day the application was filed; the manifest intent to refer all the rights of the railroads to the Interstate Commerce Commission, and the fact that, unless the Commission has the power assumed, a part of the railroads' constitutional rights will be left in the air.

The Air Mail Act of 1934 both initially [38] and after amendment by the Act of August 14, 1935,[39] contained a provision for the determination by the Interstate Commerce Commission of rates for the carriage of mail by air substantially the same as that in the Railway Mail Pay Act of 1916.[40] In none of the 26 cases decided by the Interstate Commerce Commission under these statutes did the Commission refix a rate to be effective during a period prior to the date of initiation of the proceeding (R. 71); in most of them, however, the Commission made its order effective as of the date of the initiation of the proceeding.[40a] While the result in these cases was the same as that reached under the Railway Mail Pay Act, there was a sharp divergence of views

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[38] 48 Stat. 933, 935.

[39] 49 Stat. 614, 616.

[40] These provisions are also substantially the same as Section 406 (a) of the Civil Aeronautics Act except for the last clause, which differs from the "make effective" clause of the latter enactment.

[40a] TWA agrees with these conclusions (Br. 56–57) except that it points to one case (Br. 58, note 72) which it interprets

within the Interstate Commerce Commission as to its correctness. In *Air Mail Compensation*, decided June 6, 1936, by Division 3,[41] it was held, in substantial reliance upon the *New York Central* case, that the Commission had authority to make its mail rate orders effective prior to the decision date and back to the date of commencement of proceedings. Chairman Mahaffie dissented on this issue on the ground that the *New York Central* case was based on eminent domain and constitutional requirements and was not a governing authority under the Air Mail Act of 1934.[41a]

On appeal to the full Commission, the decision of Division 3 was sustained.[42] Commissioners Lee and Mahaffie dissented, and Commissioners Splawn and Caskie concurred in a separate opinion; those who concurred separately pointed out that the *New York Central* case was not necessarily a governing precedent for the Commis-

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as having increased mail pay "retroactively." This case is discussed, *infra*, note 62, p. 68.

Some of the cases supporting these conclusions are cited by TWA (Br. 57, notes 70–71). TWA also refers (Br. 58, note 72) to two cases described in *American Airlines, Mail Rates*, 3 C. A. B. 323, 327 note 12, in which mail-rate decreases were adjusted retroactively to March 1, 1935. This action was taken by the Postmaster General and not the Commission and was apparently based on Section 6 (c) of the Air Mail Act of 1934, as amended (Pet. Br., App. B, pp. B10–B11), which specifically provided for retroactivity to March 1, 1935.

[41] 216 I. C. C. 166.

[41a] *Id.* at 191.

[42] *Air Mail Compensation*, 222 I. C. C. 602 (1937).

sion's action. Commissioner Mahaffie continued to dissent on this point, even after enactment of the Civil Aeronautics Act of 1938 (R. 75).[43] Thus, prior to, during, and after the hearings on S. 2 and H. R. 5234 during the Spring of 1937, the bills in which the Civil Aeronautics Act found its genesis (see *infra*, pp. 58–60) the effect of the language of the Air Mail Acts of 1934 and 1935 with regard to the power of the Commission to make its mail rate orders effective from the date of a petition was in dispute.

The disagreement in the Commission appeared soon after in the legislative arena. During the hearings on S. 2 (Substitute), Senator McKellar attacked, and Senator McCarran defended, the Commission for fixing mail rates back to the date a petition was filed.[44] Since the mail rate provisions of the bills on which hearings were being held were practically identical with those in the Railway Mail Pay Act and the Air Mail Acts of 1934 and 1935, the disagreement in the Commission and among witnesses and legislators was bound to be perpetuated by the bills.

After much inconclusive testimony at the hearings, Colonel Gorrell, the president and spokesman for the Air Transport Association, gave a detailed explanation of the *New York Central*

[43] Seven additional dissenting opinions by Commissioner Mahaffie are cited by TWA (Br. 57, note 70). In all of them, he simply referred to his dissent in *Air Mail Compensation*, 216 I. C. C. 166, 191.

[44] *Senate Hearings*, note 8, *supra*, 179, 180, 239, 291, 343.

case and his views on "Retroactive Dates re Mail Compensation." [45] Among other things, he stated:

> On a number of occasions mention has been made before this committee as to the power of the Interstate Commerce Commission to make a retroactive award.
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> * * * * * *
>
> In the first place, the character of the so-called retroactive order involved should be clearly understood. Senator McKellar refers to the same as "back pay." This seems to me a mistaken description.
>
> * * * All the Commission did that was in any sense retroactive was to make its final order [216 I. C. C. 166] effective as of the date of the filing of the petition * * *. The order did not grant any "back pay" but simply changed the rates in accordance with its decision on the petition filed June 27, 1935.
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> * * * * * *
>
> * * * unless the Commission could make its order effective as of the date its attention was called to the insufficiency of the rates, the carrier would have had to carry mail for an insufficient rate and possibly might have had to litigate its claim in the Court of Claims.
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> * * * * * *
>
> * * * there is no substantial doubt but that the Commission is empowered to put

[45] *Id.* at pp. 483–485.

> a rate order in effect as of the date when the Commisison has been formally advised an unjust rate then and there existed."[46]

The important point to note from Colonel Gorrell's testimony is that, just as was true within the Interstate Commerce Commission, the only disagreement which he attempted to resolve involved the question whether the Commission was empowered to make air mail rate orders effective as of the date the rate proceedings were initiated or whether it was restricted to making such orders effective upon their issuance.

In order to prevent the disagreement in the Commission and at the hearings from persisting if the pending bills were enacted into law, Colonel Gorrell, on the same day, offered the following amendment:

> On page 31 of the substitute change the semicolon in line 11 to a comma and insert thereafter the following: "and to make such rates effective from such date as it shall determine to be proper * * *"
>
> Explanation of the foregoing amendment is submitted to accompany the amendment proposed to pages 46 and 47, *infra*.[47]

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[46] Colonel Gorrell gave substantially identical testimony before the House Committee on Interstate and Foreign Commerce on April 8, 1937. *House Hearings*, note 8, *supra*, pp. 325–7.

[47] *Senate Hearings*, note 8, *supra*, p. 523.

The full explanation that he gave follows:

> The foregoing amendment[48] and that proposed at page 31, line 11, are necessary in order to carry forward under the new legislative jurisdiction any unfinished proceedings begun under acts repealed by this bill and continues, any undecided proceedings in court. Evidence and arguments submitted prior to the enactment of the bill are preserved for appropriate future use, and *the present authority of the Commission to fix appropriately the effective date of its rate decisions is likewise specifically preserved.*[49] [Italics supplied.]

Colonel Gorrell proposed the same amendments to the House Bill (H. R. 5234) and made exactly the same comment to the House Committee.[50] Both the Senate and House Committees accepted Colonel Gorrell's amendment and incorporated the "make effective" clause into the bills which they reported out.[51]

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[48] The amendment proposed to pages 46 and 47 provided that all orders, reports and regulations made by the Commission under the prior law would remain in effect until modified by the Commission.

[49] *Senate Hearings*, note 8, *supra*, p. 525.

[50] *House Hearings*, note 8, *supra*, p. 408.

[51] H. R. 5234 was reintroduced as H. R. 7273 (81 Cong. Rec. (May 27, 1937) 5095–6) and reported to the House (H. Rep. No. 911, 75th Cong., 1st Sess.). S. 2 was reported to the Senate on June 7, 1937 (Sen. Rep. No. 686, 75th Cong., 1st Sess.) and debated on August 13, 14, 16, and 18, 1937 (81 Cong. Rec. 8839, 8882, 8957, 8968, 9202, 9204, 9220, 9226).

The Report of the House Committee and the remarks of the Senate floor leader in debate make it abundantly clear that the testimony and explanations of the proponent of the "make effective" clause amendment were also accepted by the Committees, for they emphasize the thesis of Colonel Gorrell that, under the bill, rates for air mail were to be treated just as the Interstate Commerce Commission had treated air mail rates and railway mail rates in the past. Thus, the House Report stated:

> Rates for the carriage of air mail would be fixed by the Commission in the same manner as the Commission now fixes the air-mail rates for all domestic air-mail carriers.[52] [i. e., under the Air Mail Act of 1935.]

Senator Truman, who was in charge of the bill in the Senate, described it as follows:

> It follows exactly sections 1 and 2 of the Interstate Commerce Act so far as that can be applied to air transportation. * * * That part of the bill which refers to air mail treats air mail just as mail on railroads is treated.[53]
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> * * * this bill is simply a regulatory measure which does for the air carriers exactly what is done for railroads and for busses and trucks. I cannot too strongly emphasize that fact.[54]

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[52] H. Rep. No. 911, 75th Cong., 1st Sess., p. 18.

[53] 81 Cong. Rec. 9202.

[54] 81 Cong. Rec. 9204.

At the hearings on the 1938 bills (S. 3845, S. 3659 and H. R. 9738),[55] which had mail rate provisions substantially identical to those in the 1937 bills (S. 2 and H. R. 7273), Colonel Gorrell did not testify further on the "make effective" clause.

At the suggestion of the Committee Chairman (at both House and Senate hearings), he did not repeat those details covered in his testimony on the earlier bills, stating to the House Committee: "With your permission we will not cover any of the details which we covered last year."; [56] and to the Senate Committee: "With your permission, I shall cover nothing that would be repetitious of last year's testimony but shall adhere solely to the essential points now before you." [57] This testimony was given before the House Committee on March 30, 1938 and before the Senate Committee on April 6, 1938. The three bills being considered at these hearings became the Civil Aeronautics Act of 1938. There was no further mention made of the "make effective" clause prior to the enactment of the Act. Accordingly, the legislative history of S. 2 and H. R. 5234 is the most important source of information as to Congressional intent with respect to the "make effective" clause in Section 406 (a) of the Act.

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[55] The three bills were fundamentally the same. 83 Cong. Rec. 6725.

[56] *House Hearings*, note 10, *supra*, p. 297.

[57] *Senate Hearings*, note 20, *supra*, p. 21.

The "make effective" clause was thus inserted in the bills which eventuated in the Act in order to resolve a disagreement among the members of the Interstate Commerce Commission and among witnesses and legislators at the hearings on the bills as to whether the Interstate Commerce Commission had authority to make its mail rate orders under the Air Mail Acts of 1934 and 1935 effective as of the date a mail rate proceeding was initiated or whether it was limited to making such orders effective from their issuance. The resolution of these disagreements was essential to the legislation being considered because that legislation was in the same form as the Air Mail Acts of 1934 and 1935, and if left unchanged, would be subject to the same disagreements, with resulting uncertainty. The witness who offered the amendment inserting the "make effective" clause in the pending bills explained that thereby "the present authority of the Commission to fix appropriately the effective date of its rate decisions is * * * specifically preserved." The same witness had just previously testified that "there is no substantial doubt but that the Commission is empowered to put a rate order in effect as of the date when the Commission has been formally advised that an unjust rate then and there existed." Clearly the person who offered the "make effective" clause amendment and explained it expressed an intention to grant the Commission authority to make its mail

rate orders effective as of the date a mail rate proceeding was initiated, and nothing more; and he is the only person who ever explained or even commented on the "make effective" clause during the extensive legislative consideration of the Act. Thereafter, both the Senate and House Committees accepted the amendment and incorporated it into the bills which they reported to their respective Houses. The Report of the House Committee and the remarks of the Senate floor leader in debate make it abundantly clear that the testimony and explanations of the proponent of the "make effective" clause were also accepted by the Committees, for they emphasize the thesis of Colonel Gorrell that under the bills the rates for air mail are treated just as the Interstate Commerce treated air mail rates and railway mail rates in the past. As noted earlier, the almost invariable practice of the Commission both in air mail and railway mail cases was to make its rate orders effective as of the date a proceeding was initiated.

TWA has now come forth with a new set of arguments designed to minimize the reliance to be placed on this legislative history. It contends, in the first place, that the foregoing legislative history of the "make effective" clause should not be considered at all because S. 2 and H. R. 7273 were not passed, and that the 1938 bills which ultimately became law were "greatly recast." It urges that "the only valid legislative history of Sec-

tion 406 (a) (1) appears in the Conference Report issued in June, 1938" (Br. 62, 72–73). This argument wholly overlooks the fact that during the hearings on the 1938 bills, which ultimately became the Act, Colonel Gorrell, at the request of both the Senate and House Committees, stated that he "would not cover any of the details which we covered last year," and cited the pages of his previous testimony to the Committees. It is perfectly clear that these statements, made in the spring of 1938 just prior to the passage of the Act, incorporated by reference all of Colonel Gorrell's testimony on the 1937 bills. It is apparent also that although the Act may have been "greatly recast" in some respects, no significant changes were made in the mail-rate provisions and it was therefore unnecessary for Colonel Gorrell to repeat his testimony of the preceding year. Of course, the Conference Report on the bills which became the Act is significant to the determination of the meaning of the Act. However, the "generality" of the statement in that report relied on by TWA (Br. 45) shows that it "was totally unrelated to the specific problem here at issue" (Br. 72, note 107).

TWA's second objection to the use we make of the legislative history of the "make effective" clause is that "the rate making provisions of the 1937 bills were entirely different from those of the Air Mail Acts. All the 'minutiae of ex-

pression * * * that show Congress to have been thinking of the future' * * * were eliminated" (Br. 64–65), and hence the "make effective" clause was not necessary merely to confer authority to fix rates back to the petition date. The meager examples it cites, and apparently there are no others, are both insignificant and inaccurate.[58] Both provisions conferred the same basic rate-making authority and prior to the

[58] TWA cites three instances (Br. 65 note 83). (1) It states that "rates were no longer to be fixed 'by order' which was to 'continue in force until changed.'" In fact, Section 314 of the 1937 bills (*Senate Hearings*, note 8, *supra*, p. 31), now embodied in Section 1005 (a) of the Act, provided that "all orders of the Commission * * * shall continue in force until its further order." Thus, the provision referred to by TWA was not eliminated from the 1937 bills, and the bills and the Air Mail Acts remained the same in this respect. (2) Next, TWA points to the elimination of the provision "permitting 'reexamination' of an order only after a 6-months waiting period." But the omission of this provision in the bills does not indicate that the bills were not concerned with the future aspects of mail rates. If the elimination of this provision has any significance, it is far outweighed by the elimination of the provision in Section 6 (c) of the Air Mail Acts, which specifically permitted the Commission to establish mail rates retroactively to March 1, 1935. (3) Finally, TWA refers to the provision in the 1937 bills (Section 406 (a) of the Act) that "the Commission was 'directed' to act at all times 'Upon its own initiative.'" This does not appear to be different in substance from the provisions of Sections 6 (a) and 6 (b) of the Air Mail Acts, and the practice thereunder. In any event, it can hardly be argued that because the 1937 bills directed the Commission to proceed upon its own initiative, the mail rates subsequently fixed by the Commission would not have future application, particularly since the Commission was directed to act from "time to time."

Gorrell amendment, both were subject to dispute as to the power to fix rates back to the petition date.

In the third place, TWA criticizes our analysis on the ground that Commissioner Mahaffie's disagreement with the Commission only arose over the question whether air carriers were compelled to render service under the Air Mail Acts, and since there was no doubt but that air carriers were required to render such services under the 1937 bills the point of disagreement would not have been perpetuated by the 1937 bills (Br. 65–66). This is inaccurate. It is true that Commissioner Mahaffie disagreed with the majority of the Commission when it relied on the *New York Central* case in awarding mail pay under the Air Mail Acts back to the date of a petition. It is also true that his disagreement was predicated on the fact that air carriers were not compelled to carry the mail. However, it is *not* true that air carriers *would* be compelled to carry the mail under the 1937 bills, as TWA contends. Under Section 305 of the 1937 bills (Section 401 of the Act) air carriers were permitted to apply for certificates of convenience and necessity without requesting authority, or accepting the obligation, to transport mail. *Senate Hearings*, note 8, *supra*, pp. 22–24. The suggestion that every certificate should require the carrying of mail, a situation characterized as being like that existing for railroads, was discussed in detail

by Colonel Gorrell, who opposed such a requirement for air carriers because the airlines' economic situation differed from that of the railroads, and the suggestion was never accepted by the Committee (*Id.* at pp. 455–458).[59]

Thus, the airlines' situation was quite different from that of the railroads; petitioner concedes that the railroads had no duty to carry the mail

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[59] Colonel Gorrell described the proposal, which, he said, "seems agreed * * * would be undesirable", as follows: "In other words, although with respect to applications for certificates to operate a service between any particular points the Commission would be free to determine whether a certificate should be granted for passengers, or for express, or for freight, or for all of such classes of service, the Commission would not be free to grant a certificate which would exclude authority to carry mail; every certificate, no matter for what class of traffic, would carry with it the authorization to carry the mail whenever the Postmaster General desired to place mail upon the craft of that carrier between the points in question.

"This method of dealing with the problem is, as I have said, substantially the method adopted in the case of the railroads. That is, every railroad is under an obligation to carry the mail if the Postmaster General desires to place mail upon its trains." (*Senate Hearings*, note 8, *supra*, pp. 455–456.) He summarized his reasons for indicating why such a proposal was apt for railroads but not for airlines in the following language: "As I have said, the method adopted in the case of the railroads is perfectly appropriate for that industry because of the relatively minor part that the mail traffic plays. Every railroad, if it is able to enter business at all, is able to carry the mail, and if there is enough traffic generally to justify a new service the presumption is that an additional railroad mail carrier will not seriously affect the position of other such carriers. Among air carriers, however, this situation does not obtain" (*Ibid.*, at p. 457).

prior to the Railway Mail Pay Act (Br. 46–47), but were compelled to do so by that enactment (Br. 49), unless they discontinued their railroad operations. Under the 1937 bills, and the Act itself, air carriers could be authorized to continue all of their existing operations except the carriage of mail, although practically, in view of the benefit of the mail subsidy to them, a request for such limited authorization would be unlikely. Commissioner Mahaffie could have pointed out the same kind of thing that he pointed out in his dissenting opinion under the Air Mail Act, namely, "The air line is under no legal compulsion to become a contractor [carrier]." *Air Mail Compensation*, 216 I. C. C. 166, 192.[ggg] Indeed, the voluntary character of a carrier's operations under the Civil Aeronautics Act was recently pointed out by the

[ggg] This is also the fallacy in TWA's contention that if Congress had wished to codify such power as existed under the Railway Mail Pay Act it only had to copy the language of that Act, without adding the "make effective" clause (Br. 45, 72). Since the 1937 bills did not compel carriers to carry mail unless they chose to do so, their situation differed from that of railroads. It was precisely this difference between involuntary carriers under the Railway Mail Pay Act and voluntary carriers under the Air Mail Acts that led to disagreement in the Commission and between witnesses and legislators at the hearings. Recognizing that if it used the same language as in the earlier acts, it would carry over the existing disputes as to what the language meant, Congress altered the language to make clear that under the new Act mail rates could be made effective as of the time a petition was filed.

Court of Appeals in another proceeding arising out of the Board's decision in this case.[81] It is evident, therefore, that the disagreement in the Commission over the Air Mail Acts would have been perpetuated had the 1937 bills been enacted into law without the addition of the "make effective" clause.

Finally, TWA says that our analysis of the legislative history of the "make effective" clause is wrong because, in addition to the disagreement under the Air Mail Acts as to whether rates could be made effective back to the date of a petition rather than from the date of issuance of an order, there was also disagreement as to the power of the Commission to make rates retroactive generally, and that the disagreement concerning the general power of the Commission was also resolved in favor of the regulatory body (Br. 66–72). In support of this proposition, TWA argues first that the difference between Commissioner Mahaffie and the Interstate Commerce Commission was of this dual character. However, the dissenting opinions which it cites do not bear out its contention.[82] It is perfectly plain, considering all

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[81] *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, decided December 6, 1948, where the court stated: "The Civil Aeronautics Act, *under which Capital chose to operate*, embodies a scheme," etc. [Italics supplied.]

[82] The three cases relied on by TWA are cited on page 66 of its brief in note 87. An analysis of Commissioner Mahaffie's dissent in these cases follows: In *Air Mail Rates For Route No. 31*, 216 I. C. C. 381, 404, Commissioner Mahaffie

of Commissioner Mahaffie's dissents, that the disagreement among the members of the Interstate Commerce Commission was limited to the narrow question of whether the Commission had authority

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discussed the facts of the case and stated: "In my opinion, we are not justified on this record in attempting to adjust compensation for the carrying of air mail so as to make the entire operation profitable." Commissioner Mahaffie urged that, on the facts of that particular case, there was no basis for fixing higher rates back to March 1, 1935. The Act specifically conferred power to fix rates back to March 1, 1935, and Commissioner Mahaffie did not unqualifiedly dispute that power as he did in the cases where the Commission fixed rates retroactively to the date of a petition. In *Air Mail Compensation*, 222 I. C. C. 602, 610, Commissioner Mahaffie dissented on the sole ground that the Commission was without power to fix a rate retroactively to the date a petition was filed. There is no basis for concluding that he dissented because "the Commission amended a 1935 order by a proceeding begun in 1937, so as to insert a proviso which had the effect of reducing rates from 1935," as TWA suggests. The amendment inserting the proviso was dealt with summarily by the Commission and not mentioned in the dissent. Moreover, in *Air Mail Compensation*, 232 I. C. C. 608, 614, the third case relied on by TWA, where the Commission "amended the order again and struck out the proviso," Commissioner Mahaffie dissented without opinion. To the extent that the two cases last cited involve any problem of retroactivity different from the issue as to whether the Commission was empowered to make its rates effective as of the date of the filing of the petition, the problem is not unlike that involved in the Board's "reopening" cases, discussed *infra*, pp. 7–78.

In contrast to the foregoing dissenting opinions, in every case in which the Commission fixed a mail rate back to the date of a petition, Commissioner Mahaffie dissented with the statement that he was doing so for the reasons stated in his dissenting opinion in *Air Mail Compensation*, 216 I. C. C. 166, 191 (see Pet. Br. 57, note 70).

to fix mail rates back to the date of a petition or whether it was restricted to making such rates effective from the date of issuance of an order.

It is equally clear, contrary to TWA's second argument on this point, that the disagreement between witnesses and legislators at the hearings on the 1937 bills concerned precisely the same issue. It may be conceded that during the hearings there were some general references to retroactivity, including references to rates being made retroactive to March 1, 1935, as specifically provided in the Air Mail Acts, and that "charges and counter-charges of all sorts were made." (Pet. Br. 68.) Nevertheless, it is crystal clear that as the argument developed, it narrowed into the precise question of whether the Commission had authority to fix mail rates back to the date of a petition. Colonel Gorrell resolved the issue. He addressed himself at length to this precise problem and concluded that "there is no substantial doubt but that the Commission is to put a rate order in effect as of the date when the Commission has been formally advised an unjust rate then and there existed" (*supra*, pp. 56–57). His statement is replete with references to a specific proceeding in which the Commission fixed a rate back to the date of a petition. His whole concern was with that problem. He made no reference to any general problem of retroactivity, although such

problem had been mentioned in the hearings.[63] He then offered the "make effective" clause amendment to preserve that power and his explanation leaves no doubt on that score. TWA's belated attempt to confuse what is clear takes no account of these facts. Far from being concerned here with "mute intermediate legislative maneuvers" (Br. 72), we are concerned with a prepared, detailed statement on a narrow issue by the person who offered an amendment which ultimately was incorporated into the Act without change. Such evidence is conclusive.

TWA urges further that the "make effective" clause cannot have the limited meaning Colonel Gorrell indicated because the language used was too broad, particularly when viewed in the light of the language of other parts of the Act (Br. 18–19). It may be conceded that the "make effective" clause could have been drawn more narrowly and have accomplished its purpose; it must likewise be conceded that it was adequate to accomplish the purpose of the draftsman. The most likely reason for the difference between its language and that of other parts of the Act is that they were prepared by different draftsmen,

[63] This situation differs sharply from that in *American Stevedores, Inc.* v. *Porello*, 330 U. S. 446 (Pet. Br. 71, note 106). In this case, Colonel Gorrell was not only aware of the general problems of retroactivity, but he specifically limited himself to providing an answer to the question whether the Commission should have power to fix mail rates back to the date of a petition.

the "make effective" clause being engrafted onto a completed bill. It is unnecessary to speculate, however, on the reasons for such differences. The meaning of the "make effective" clause is abundantly clear from its legislative history. If the remainder of the Act is examined, we get confirmation, rather than denial, of the fact that the meaning of the "make effective" clause is limited to conferring authority on the Board to make mail rates effective from the date of initiation of a mail rate proceeding, for any broader interpretation would destroy the rate-making pattern which is fundamental to the Act.

It must be concluded, therefore, that the "make effective" clause does no more than clearly authorize the Board, where it determines such action to be proper, to make its mail rate orders effective from the date of the initiation of mail rate proceedings. This being so, the "make effective" clause cannot have the effect petitioner claims for it, with the result that the decision of the Court of Appeals must be affirmed.

C. THE BOARD'S PRIOR ADMINISTRATION OF THE ACT SUPPORTS THE CONCLUSION REACHED BY IT IN THIS CASE

1. *The Board has consistently refused to fix mail rates to be effective during a period in which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding.*—The only sound way to determine

the Board's construction of the Act with reference to the issue raised by this case is to examine its previous decisions where that issue was raised and decided.[44] There are eight such determinations and in every one of them the Board refused to fix a final rate prior to the petition date. The Board explained its position as follows (*Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401):

> Aside from the question of whether it [the Board] has the statutory power to review a rate prior to the date of the institution of the proceeding, it seems desirable as a matter of policy that the rate for any given period become finally fixed at some point in time and that such point be that at which the rate is first challenged or questioned by the institution of a rate proceeding by the carrier or by the Board. Such a policy appears to be fair since it permits every rate order to be final for any period during which it is not questioned by a proceeding looking toward its revision.

In seven other decisions on this issue, prior to the determination in the case at bar, the Board followed the same reasoning and reached the

[44] TWA cites a series of instances in which the Board is alleged to have exercised the statutory power now in issue. These cases, involving various factual situations unlike that in the case at bar, will be considered below, pp. 74–80.

same conclusion although in the later cases it made no reference to its statutory authority.[65]

From these decisions it is apparent that the Board has never asserted its alleged power to redetermine rates "retroactively," but, on the contrary, has specifically reserved the question of its statutory authority to do so. In each instance, *without examining the past period,* it has refused to fix rates "retroactively," on grounds of "sound general policy" (R. 15). In deciding these cases on one of two available grounds, the Board was following a commonplace judicial technique, which in no way indicated that it believed the statute authorized it to review rates "retroactively."

2. *All of the instances cited by petitioner involve different factual situations and in none of them did the Board indicate that it had the asserted power.*—TWA attempts by reference to

[65] *Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 2 C. A. B. 683, 688 (1941); *Mid-Continent Airlines, Inc., Mail Rates*, 3 C. A. B. 464, 466 (1942); *Braniff Airways, Inc., Mail Rates*, 3 C. A. B. 633, 635–637 (1942); *Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143 (1943); *All American Aviation, Mail Rates*, 4 C. A. B. 354, 357 (1943); *Pan American Airways, Inc. Alaska Mail Rates*, 6 C. A. B. 61, 69 (1944); *Caribbean-Atlantic Airlines, Inc., Mail Rates*, 7 C. A. B. 943, 946 (1947). In the *All American Aviation* case, the Board stated, "Moreover, adoption of respondent's contention would, in effect, result in the establishment of a 'cost plus' system of rate making and would tend to destroy respondent's incentive to develop air express and to maintain costs at a reasonable level."

isolated decisions and actions of the Board in wholly different factual situations to establish that the Board has fixed rates prior to the date a proceeding was initiated, or "retroactively," hoping thereby to create an inference that the Board has interpreted the Act as authorizing it to revise rates "retroactively" in the situation under consideration (Br. 85–97). We shall discuss these cases on the basis of the classification used by the petitioner:

a. *The new route cases.*—In these cases, the Board fixed an initial rate for new routes from the date operations commenced thereon even though that date was prior to the initiation of the rate proceedings.[66] Since no rate had ever been fixed for these operations, the Board did not ret-

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[66] *All American Aviation, Mail Rate for Route No. 49*, 3 C. A. B. 79 (1941); *United A. L. Mail Rate for Route No. 57*, 3 C. A. B. 381 (1942); *Caribbean-Atlantic Air Mail Rates*, 6 C. A. B. 407 (1945); *Pan American Airways, Inc., Alaska Mail Rates*, 6 C. A. B. 61 (1944), where in the same proceeding the Board refused to revise a rate "retroactively" but fixed a rate for a new route prior to the date the proceeding was initiated. The Board stated at page 70: "Accordingly, the review of the rates for these routes [Juneau-Whitehorse and Whitehorse-Fairbanks] will be confined to the period on and after the date of the filing of the petition. The period of review for the Seattle-Juneau route, however, will commence on June 21, 1940, as that was the date of inauguration of mail service on that route and no rate has heretofore been fixed." Obviously, the Board did not think its new route doctrine was inconsistent with its refusal to revise final rates "retroactively" or it would not have applied both principles in successive sentences in the same opinion.

roactively revise a final rate prior to the petition date as TWA seeks to have it do here. The finality of a Board rate order was not impaired. See *infra*, pp. 83–85.

b. *The system cases.*—In these cases,[67] the Board merely extended the new route doctrine to a carrier with old routes, the existence of more than one route necessitating the determination of "need" on a system basis.[68] In neither of these cases did the Board's order revise the previously

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[67] *Western Air Lines, Mail Rates*, 4 C. A. B. 441 (1943); *Northeast Airlines, Inc., Mail Rates*, Order Serial No. E-1230, decided February 26, 1948. TWA also cites *Colonial Airlines, Mail Rates*, Order Serial No. E–1263 (March 4, 1948) but this case merely fixed a temporary rate which is expressly subject to revision when the final rate is fixed. Order Serial No. E–1340, April 1, 1948.

[68] Section 406 (b) provides that, in determining a mail rate, the Board must consider the "need" of each "air carrier" for compensation which "together with all other revenue of *the air carrier*" will permit the achievement of the statutory objectives. (Italics supplied.) The examination of the revenues of the carrier on a "system or over-all basis" is, therefore, "necessitated" irrespective of whether the rate is fixed on a route or a system basis. As the Board stated in an earlier case (*Transcontinental & Western Air, Inc., Mail Rates*, 4 C. A. B. 139, 143 (1943)), in concluding that TWA's rates should be reviewed on a system basis: "* * * petitioner requested the fixing of fair and reasonable rates for route No. 2 only. However, under the provisions of the Act we are required to determine the need of a carrier for mail compensation sufficient to enable it, together with revenue from all sources, to continue to render adequate transportation service. Under the present circumstances the Board deems it necessary to review the operations of petitioner as a whole although we may fix a rate for a single route if such a review indicates the necessity therefor."

fixed final rate for the old route although it examined the rates for such routes in order to determine the "need" of the system as a whole. Nor do these cases afford any basis for concluding that the Board interpreted the Act as giving it power to make such revisions.

c. *The "reopening" cases.*—In one[69] of the two cases cited (Br. 89–91), the Board reopened merely for the purpose of clarifying an ambiguous order and applied the clarification as of the effective date of the original order. In the other,[70] the Board reopened a proceeding promptly and then later broadened the reopened proceeding to specifically encompass additional issues.[71] In both cases the reopening was a

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[69] *Pan Am. Airways Co. (Del.), Transatlantic Mail Rates*, 1 C. C. A. 220 (1939); *Pan Am. Airways Co. (Del.), U. S.-Azores Mail Rates*, 1 C. A. A. 650 (1940).

[70] *Pan. American Airways, Inc.; Latin-American Mail Rates*, 6 C. A. B. 85 (July 17, 1944, Supplemental Opinion).

[71] The original opinion was issued on August 28, 1942. *Pan American Airways, Inc. Latin-American Rate Case*, 3 C. A. B. 657 (1942). Pursuant to the request of the carrier dated October 22, 1942, the Board, by order (Serial No. 2051) dated November 25, 1942, "reopened" the proceeding "for rehearing, reargument, and reconsideration * * *" (6 C. A. B. 85). "Subsequently it was brought to the Board's attention that certain amounts had been erroneously included in the computation of respondent's investment upon which a return was allowed for rate-making purposes in our original opinion. Accordingly, by order [Serial No. 2726] of February 28, 1944, the proceeding was further reopened so as to permit revision of respondent's investment in this respect". (6 C. A. B., at pp. 85–86). The modified order was made effective as of the same date as the original order (6 C. A. B. at p. 94).

proper exercise of the Board's power,[72] and neither case can fairly be construed as retroactively revising a final rate under the disguise of reconsideration.

d. *The "American" case.*—This case[73] was limited to fixing a rate back to the date of the institution of the proceeding. The revision of the rate prior to that date was not in issue. The statements of the Board so often quoted by TWA (Br. 17, 39–40, 51, 61, 76, 83) were directed solely to the power to fix a rate back to—not before—the date the proceeding started. Cf. Pet. Br. 79.

e. *The nunc pro tunc petition device.*—While the Board memorandum of June 3, 1942 proposed a limited use of such petitions in a special war time situation for a limited period of 17 days, no petitions were actually filed. In making this offer, the Board was not directing its attention to the question of whether the statute authorized it to revise rates "retroactively" but was concerned with finding a practical means of fulfilling its promise to the carriers, made in the memorandum of May 22, 1942, to institute rate proceedings as of June 1. If the memorandum of June 3, 1942 evidenced the Board's conviction that it had

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[72] Sec. 1005 (d), 49 U. S. C. 645 (d). This Section provides: "Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper."

[73] *American Air Lines, Mail Rates*, 3 C. A. B. 323 (1942).

power to revise mail rates "retroactively", then the elaborate proposal in the memorandum to treat petitions filed between June 3 and 17 as having been filed on June 1 was wholly unnecessary because, on such an assumption, it could have made its ultimate rate orders effective on June 1.

No instance has been cited, because there is none, where the Board fixed a new mail rate applicable to a period during which a final rate previously fixed by the Board was in effect and unchallenged by the initiation of a rate proceeding, as TWA seeks to have it do here. Nor has any instance been cited where the Board has said or done anything from which it may reasonably be inferred that the Board believed it had power to take such action.

We have sought to demonstrate that the Board decisions upon which the petitioner relies have no bearing on the issue with which this case is concerned. But even if these cases, or some of them, may be deemed to have some relevancy, they are not decisions in which the Board has consciously and carefully, after thorough consideration, rejected a previously consistent course of conduct.[74] Only a deliberate administrative judgment is

[74] *United States* v. *Alabama Southern Rd. Co.*, 142 U. S. 615.

given weight in the resolution of a controversy as to the meaning of a legislative enactment.[75]

All of the cases relied on by petitioner were fully presented to the court below. Upon consideration of them the Court of Appeals concluded (R. 115):

> TWA * * * urges what it considers examples of retroactive application of Board orders. But we do not find those instances indicative of the retroactivity which is necessary to support its position here. TWA also urges the implications from the Board's failure, over the years, to say it had no retroactive power. We think that the administrative history of this statute has no material bearing one way or the other upon the question of statutory power.

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[75] *Skidmore* v. *Swift & Co.*, 323 U. S. 134. This Court there stated with reference to the Interpretative Bulletins of the Wage and Hour Administrator:

"They are not, of course, conclusive, even in the cases with which they directly deal, much less in those to which they apply only by analogy" (323 U. S. at 139).

The Court went on to state (323 U. S. at 140):

"The weight of such [a ruling, interpretation or opinion] in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control".

It is apparent that under these standards, opinions of the Board which do not relate to the question of statutory construction at issue, as is true of the cases relied on by TWA, are entitled to no weight.

3. *The general practice of the Board in fixing future rates is inconsistent with the existence of the power to refix final rates prior to the petition date.*—It bears repeating that the Board views the Act as establishing a rate-making method for the determination of mail compensation as contrasted with TWA's view that the Act establishes a cost plus system of auditing for such purposes. This means that the Board is interested primarily in fixing fair and reasonable *rates* of compensation for the *future* rather than fixing fair and reasonable *amounts* of compensation for the *past*. It means further that the rate orders of the Board have the attribute of finality and are not always subject to revision.

During the ten years of its existence, the Board has been concerned consistently and substantially in fixing fair and reasonable rates for the transportation of mail by aircraft to be applicable in the future.[76] It would serve no purpose to examine all of the numerous similar mail rate decisions. It will suffice to refer to the typical decision in the rate proceeding involving TWA, which TWA now seeks to nullify (see pages 4–7, *supra*), and the Board's statement in *Chicago and Southern Air Lines, Mail Rates*, 4 C. A. B. 419 (1943), where the Board denied the carrier's request that

[76] *First Annual Report of the Civil Aeronautics Authority* [Board] (1939), p. 21; *Annual Report of the Civil Aeronautics Board, 1941*, pp. 7, 15; *Annual Report of the Civil Aeronautics Board, 1943*, p. 25; *Annual Report of the Civil Aeronautics Board, 1947*, p. 11.

a reduction in rates be deferred until it had an opportunity to accumulate net earnings sufficient to yield a fair return on its investment from the beginning of operations. The Board stated (p. 420):

> The mail-rate provisions of the Civil Aeronautics Act do not call for what would be in effect a revision of historical earnings so as to reimburse the carrier for inadequate profits received in the past; those provisions require the establishment of present and future rates which will enable the carrier under honest, economical, and efficient management to discharge its public service obligations as specified by the Act. The statutory policy is not remedial of past inadequacies; it is instrumental of present and future accomplishment.

Since the Board's practice has been to establish mail rates for the future it must have construed the statute as giving those rate determinations finality. It cannot reasonably be assumed that the Board would expend time, effort and money to fix future rates if it construed the statute as requiring it to replace all such determinations with the results taken from audits made after the facts became known. It is submitted that the practice followed by the Board in administering, and deciding cases under, the mail rate provisions of the Act shows a course of conduct which is only consistent with the view that its mail rate orders have the attribute of finality.

It does not follow, however, that the Board never makes a rate order effective as of a date preceding its issuance. As we have seen in the preceding section of this brief, the "make effective" clause was designed to make clear that the Board had power to make its mail rate orders effective from the date rate proceedings were initiated, notwithstanding that the order was not issued until a much later date. In its first mail rate decision,[77] the Board used the discretion conferred by the "make effective" clause, stating: "We find * * * the fair and reasonable rate of compensation * * * from and after October 22, 1938, the date of the filing of the petition herein, is * * *." This practice has generally been followed by the Board,[78] with the result that in most mail rate decisions the Board is not only fixing rates for the future but also for the past period between the initiation of the proceeding and the issuance of its decision.

Likewise, the Board's practice of issuing temporary rate orders under certain circumstances while it is conducting permanent rate investigations results in a readjustment of the compensation paid to the carrier under the temporary rate

[77] *Mid-Continent Airline, Inc., Mail Rates*, 1 C. A. A. 45, 58 (April 14, 1939).

[78] *Annual Report of the Civil Aeronautics Board, 1943*, p. 17; see *Continental Air Lines, Inc., Mail Rates for Routes Nos. 29 and 43*, 3 C. A. B. 395, 401 (1942), and cases cited therein.

on the basis of the final rate when it is ultimately determined.[79] In these situations, and others,[80]

[79] A "temporary rate order does not fix a final rate but merely establishes a conservative basis for payment upon estimated accrued obligations of the Government pending the determination of a permanent rate which may be either higher or lower than the temporary rate theretofore in effect." *National Airlines, Inc., Mail Rates*, Order Serial No. E–1271, decided March 5, 1948, p. 5. Temporary rate orders are issued in two classes of cases: (1) where a new air carrier without past operating experience is involved, and the failure to establish a temporary rate and afford some mail compensation would result in the undue dissipation of its working capital (*Essair, Inc., Temporary Mail Rate*, 6 C. A. B. 687 (1946); *Challenger Airlines Company*, Order Serial No. E–560, decided May 21, 1947); and (2) where a carrier shows financial necessity. In order that a carrier be placed in this class, "First, there must be a showing that its immediate financial position is critical. Secondly, it must appear that its existing rate is substantially inadequate." *National Airlines, Inc., Mail Rates*, *supra*, p. 6. TWA's comment (Br. 85, note 124) that a temporary rate is frequently increased retroactively to a date prior to the institution of the proceeding brought to change the temporary rate is accurate but of no significance. The temporary rate is never made effective prior to the date when the permanent rate ultimately fixed will be made effective. The temporary rate procedure is designed to relieve carriers from hardships during the pendency of the investigation of final rates and obviously must be flexible if it is to be of any value. Of course temporary rates are always adjusted in accordance with the rates finally determined.

[80] The Board has interpreted Section 405 (a) of the Act (52 Stat. 994, 49 U. S. C. 485 (a)) as granting it authority to make mail rate orders effective prior to their issuance in the situations there described. *Alaska Airlines, Inc., Mail Rates*, Order Serial No. E–1885, decided August 13, 1948. A similar situation appears to exist under the provisions of Section 405 (b) of the Act.

the order of the Board may be termed "retroactive" in effect. It is important to note, however, that these orders are not "retroactive" in the sense that TWA uses the term, for *none of these orders superimpose new rates on rates previously and finally fixed.*

This distinction is important because "retroactive" orders of the kind the Board admittedly issues do not destroy the rate-making method as the primary determinant of mail compensation, whereas "retroactive" orders of the kind contemplated by TWA make all rate orders subject to revision and result in a cost plus system of auditing becoming the ultimate method for determining mail compensation. For, under petitioner's construction, there will invariably be a contention that the fair and reasonable future rate fixed by the Board should be revised by a post-audit after the results of operations under it become known in order to supplement or reduce the level of profit achieved. Under these circumstances, the rate-making process would lose all significance (Cf. Br. 42–43).

4. *The practice of the Board produces no incongruous results.*—TWA attempts to show that the general practice of the Board, as set forth above and sanctioned by the Court of Appeals, cannot be what was intended because it produces such incongruous results. One such result, it is claimed, is the inability of the Board to correct its rate "predictions"

or "prophecies," which are necessarily difficult to make accurately. (Br. 8, 13, 77, 84.) In fixing a future mail rate there is, of course, a risk that the estimates made by the Board may not be realized or may be exceeded. Such risks may be minimized in different ways. In the Civil Aeronautics Act, Congress did so by providing that rate determinations be made by the Board after notice and hearing, followed by review in the courts, and that such rates could be changed in new proceedings, similarly safeguarded, initiated by any of the interested parties at any time. Clearly, the Act establishes a procedure giving the Board a high degree of flexibility in correcting its "prophecies."

TWA complains, however, that the device of filing a petition at any time to protect against changes in circumstances affecting a mail rate unfairly discriminates between carriers because it makes relief dependent upon the "lucky coincidence" of having a petition on file when "catastrophe" strikes, and "rewards the rash and penalizes the prudent airline" (Br. 19–22). As an example of the "lucky coincidence" argument, it points to a situation where aircraft used by two airlines are suddenly grounded. Carrier X, which has a petition on file for other reasons, will be protected, while carrier Y, with no petition on file, will be unable to obtain "full redress," the argument runs. Actually, there is no discrimination because carrier Y and carrier X receive the same protection from the Board against sudden

groundings," or other "catastrophes."[82] In a recent opinion the Board explained its position as follows:[83]

> While costs attributable to the grounding of aircraft types are neither normal nor recurrent in nature, such costs are, nevertheless, peculiar to the air transportation industry and must be taken into consideration in establishing both mail and non-mail rates for air carriers. But costs of this nature are neither predictable nor capable of accurate measurement on a prospective basis. No accurate prediction can be made as to the incidence of the cost with respect to a particular carrier although the risk that such cost may be incurred exists in the case of all carriers. The imminence and universality of a contingency such as this cause it to become established as one of the risks of doing business which is reflected as a normal cost of capital rather than as a normal cost of operations.

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[81] *Braniff Airways, Inc., Mail Rates*, Order No. E-2129, October 28, 1948.

[82] In *National Airlines, Inc., Mail Rates*, 7 C. A. B. 387 (1946), the Board held that costs attributable to accidents are not allowable for rate-making purposes. In *National Airlines, Inc., Temporary Mail Rates*, Order Nos. E-2237 and 2285, December 11, 1948, the Board refused to recognize strike losses for purposes of establishing a temporary rate because they were abnormal.

[83] *Braniff Airways, Inc., Mail Rates, supra.* TWA's quotation of only part of this explanation is quite misleading. (Br. 20, note 17).

The treatment of all carriers, whether "rash" or "prudent" or "lucky" or "unlucky" in filing petitions, is therefore the same in connection with "catastrophes", "disasters", or "calamities". Such risks are capital risks and not operating risks. The cost incurred as a result thereof are not reimbursed as operating expenses but in the rate of return which is calculated on the basis of the long term risks of the business. The protection afforded carriers for losses because of catastrophes is not dependent upon the filing of a petition but upon the payment over a period of time of a rate of return commensurate with the long run risks inherent in the air transport industry.

If the Board should fix a rate in which the return on investment did not fully recognize those risks, its order would, of course, be subject to judicial review. Actually, because of the risk of catastrophes, the Board has given air carriers a high rate of return on their investment. Thus, in the decision which TWA now seeks to destroy by a retroactive revision of rates, the Board fixed a rate calculated to give TWA a return of 13.77 per cent, *after* taxes, on its investment (see page 7, *supra*).

In considering the risks of the business in computing the rate of return, the Board was following the accepted practice in public utility rate

making."[84] While "groundings" may be a risk peculiar to air carriers, public utilities are also subject to "catastrophes", of different kinds including strikes, floods, hurricanes and explosions. The courts have given no indication that the possibility of the occurrence of "catastrophes" affecting a public utility, makes the refusal to reimburse past losses in a rate "arbitrary" and "unfair".[85]

Since it appears that airlines receive the same treatment with respect to disasters irrespective of whether they have a petition on file with the Board, we turn now to the problem of losses arising from normal changes. Such changes concern variations in the volume of traffic, in the level of costs, and similar factors, rather than catastrophes. They do not change abruptly from day to day.[86] Nor does a reasonable rate become confiscatory at a given hour, or on a given day.

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[84] *Bluefield Waterworks & Improvement Co. v. Public Service Commission*, 262 U. S. 679.

[85] The past losses which the utility sought to recoup in *Galveston Electric Co. v. City of Galveston*, 258 U. S. 388, resulted from the Galveston hurricane.

[86] In the decision which TWA now seeks to destroy by a retroactive revision of rates, the Board stated it was fixing a rate which would provide a fair and reasonable return "although on the basis of reported results for selected short periods the rate may appear either unduly high or unduly low" (see page 6, *supra*).

On the other hand, it need not take very long for a carrier to file a petition.[87]

The complexity and time-consuming nature of the task of preparing a petition may be judged by reading TWA's petition in the instant case (R. 8–13). This petition is typical. The Board's regulations do not require that a petition be supported by profound economic studies. All that is required is that the petitioner state the rate which it believes fair and reasonable. This requirement, in practice, has imposed no burden as carriers commonly petition for the highest conceivable rate and, should they err in the original petition, the Board has freely permitted amendments. In any event the rate finally fixed by the Board must be based upon the evidence of record rather than the rate asked for in the petition.

TWA also argues that a new petition may be filed by a carrier the day after the Board fixes a future rate and that the rate fixed on the new

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[87] The Board's Economic Regulations only require that mail-rate petitions be verified by three officers, in the case of a corporation, and that the following information be included:

"The petition should, in accordance with the provisions of section 406 (c) of the Act, include a statement of the rate the petitioner believes to be fair and reasonable. In this connection, the rate-making elements set forth in section 406 (b) of the Act should be particularly considered by the petitioner in the preparation of the petition. Opportunity for argument will be given at the public hearing."

Civil Aeronautics Board, *Economic Regulations*, Part 216.1 (f); (14 Code of Fed. Reg. (1938 Supp.), Sec. 216.1 (f)).

petition would govern the period after its filing so that the first rate would "never have been 'final' in the sense of having been immune from revision for any period of time" (Br. 76). The same argument was addressed to, and answered, by the Board (R. 87–88):

> It has been suggested that it will be the effect of this decision to cause all carriers to keep a "protective" petition on file with the Board at all times in order to prevent unpredictable losses. We do not anticipate this development. From management's viewpoint the situation will not be materially different from that which has existed heretofore. The carriers have long been aware of our unbroken policy not to fix retroactive rates. Furthermore, the Board has exactly the same authority with respect to the date from which it can make its mail rate orders effective, whether a new rate be higher or lower than one previously in effect. Unless a carrier believes that it will realize less than a fair and reasonable return from the date on which it files, there would be little point in filing. Should it file and thereafter earn more than a fair and reasonable return, our rate order, effective from date of filing, would effect a reduction in mail pay from that date forward.

The fact is that for over ten years the Board has refused to revise final rates retroactively, and the Board has received only a handful of protec-

tive petitions. Experience shows that "protective" petitions have not converted the Act into the "cost-plus" pricing device which TWA seeks to create.[88] Recent actions of the Board in recapturing excessive profits earned during the pendency of a "protective" petition will undoubtedly further discourage the filing of such petitions.[89]

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[88] Carriers have been reluctant to file "protective" petitions. Among the reasons why this is true may be the following: the pendency of a mail rate proceeding creates uncertainty; profits earned may be subject to recapture; financial statements cannot be final, and the ability to float securities or negotiate loans is impaired. Indeed the experience of the Board indicates that rate finality is dictated not only by the provisions of the Act but by the necessities of business operations.

[89] *Western Air Lines, Inc., Mail Rates*, Statement of Tentative Findings and Conclusions, Order No. E–2333, December 30, 1948. The Board stated (p. 4): "For approximately a year and a half following the filing of its petition Western earned a greater return on its investment under the service rate fixed by the Board on November 8, 1943, than the Board is currently providing carriers for past periods. During this period, the petition, from the point of view of Western, was protective in nature, since the mail rate as established was more than adequate to provide a reasonable return. It would be more advantageous to Western, therefore, if, as Western has informally requested, the Board were only to revise Western's mail rate from January 1946, when it first started to incur significant losses, since such a review would not result in offsetting relatively high profits earned from April 1944 to January 1946 against losses suffered subsequently. * * * The effect of keeping the mail rate constantly in issue through the device of "protective" petitions, is to place the carrier on a cost plus basis. It would obviously be inequitable and contrary to the public interest to provide protection to the carrier against losses without reciprocal

Finally, there may be considerable doubt as to whether a paper filed the day after a rate has been fixed constitutes a "petition", within the meaning of Section 406 (a) (1) of the Act. If it does not, or if it can be regarded as not filed in good faith, the Board may, of course, dismiss the proceeding promptly without a hearing. Clearly there can be no warrant for erroneously establishing a "cost-plus" system of auditing for the determination of mail pay because of the theoretical possibility that "protective" petitions may give rise to limited problems under the Act.

D. THE ACT NEED NOT BE INTERPRETED AS TWA SUGGESTS IN ORDER TO PRESERVE ITS CONSTITUTIONALITY

TWA is not here seeking a declaration of the unconstitutionality of the Act, but is simply seeking to have this Court construe the Act differently than did the Board and the Court of Appeals on the ground that otherwise the Act might be unconstitutional. TWA argues that notwithstanding the fact that the Act provides that TWA shall be given a fair and reasonable mail rate, that it may at any time petition for an upward revision of such mail rate to a fair and reasonable level, such revision to be effective as of the date of

protection to the Government against excess profits. Under all the circumstances, we find that it will effectuate the policies of the Act to make our rate order for Western effective from May 1, 1944, the approximate date of filing of the initial petition."

the petition, and that such rate determinations are subject to judicial review, the Act nevertheless would be unconstitutional if it failed to guarantee TWA a profit at all times.

TWA's position rests on the contention that it is compelled to carry mail and must, therefore, be paid the "just compensation" provided by the Fifth Amendment in accordance with this Court's decision in *United States* v. *New York Central R. Co.*, 279 U. S. 73. In that case, as noted earlier (*supra*, p. 52), this Court held that the Interstate Commerce Commission was empowered under the Railway Mail Pay Act of 1916 (39 Stat. 412, 39 U. S. C. 542) to make its rate orders effective as of the date the rate proceeding was initiated rather than upon the issuance of the order. However, the Court expressed the opinion that no constitutional right accrued until a petition challenging the rate was filed. It stated (279 U. S. at 78–79):

> *We assume that while the railroads perform these services and accept pay without protest they get no ground for subsequent complaint.* * * * But the filing of an application expresses a present dissatisfaction and a demand for more. * * * If the claim of the railroads is just they should be paid *from the moment when the application is filed.* * * * [Italics supplied.]

This case, rather than supporting TWA's position, looks towards the opposite conclusion.

There is, moreover, a difference in the legal compulsion to carry mail imposed on railroads under the Railway Mail Pay Act and the provisions of the Civil Aeronautics Act relating to the carriage of airmail. The Railway Mail Pay Act required all existing railway common carriers to transport mail.[90] The Civil Aeronautics Act limited the carriage of mail to those authorized by a certificate of convenience and necessity to carry mail.[91] Existing air carriers were given the right to seek grandfather certificates authorizing air transportation for classes of traffic other than mail and under separate conditions the transportation of mail.[92] It is thus clear that

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[90] "All railway common carriers are hereby required to transport such mail matter as may be offered" (39 U. S. C. 541).

[91] "*Whenever so authorized* by its certificate, any air carrier shall * * * transport mail whenever required by the Postmaster General" (Sec. 401 (m), 49 U. S. C. 481 (m)).

[92] "If any applicant *who makes application* for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the [Board], upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic *for which authorization is sought, except mail*, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B)

while the railroads operating as of 1916, the date of the Railway Mail Pay Act, had either to carry mail or get out of the railroad business entirely,[93] air carriers had the legal option of carrying passengers and property without carrying mail at all.[94] When TWA "sought" its certificate to carry mail, it voluntarily accepted the obligation to carry mail in return for the protection and benefits afforded by the Act. The fact that there was an economic advantage in seeking a mail certificate, because of the broad benefits conferred by the need provisions of Section 406, cannot obscure the clearly voluntary nature of the obligation assumed. This is different from the abrupt legal compulsion imposed on the existing railroads by the Railway Mail Pay Act. See also *supra*, pp. 65–68. TWA's right to compensation for carrying the mail is defined by the Act—not by the Fifth Amendment.

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with respect to mail and all other classes of traffic *for which authorization is sought*, between the terminal and intermediate points between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail." (Sec. 401 (e) (1), 49 U. S. C. 481 (e).) [Italics supplied.]

[93] After the Transportation Act of 1920, railroads could not cease to be such without the approval of the Interstate Commerce Commission. (49 U. S. C. 1 (18).)

[94] In a major certificate proceeding now pending before the Board, the principal applicants are seeking certificates authorizing the large scale transportation of property only without the transportation of either passengers or mail. *Air Freight Case, Docket 810.*

The significant cases in the determination of the issue raised by TWA are public utility rate cases. In such cases, the utilities perform repetitive services at rates which are normally predetermined in accordance with a prearranged statutory plan, just as is true in the present case. These utilities operate under certificates of convenience and necessity similar to those issued to air carriers and are subject to the same type of compulsion to render service. The protection afforded to such utilities by the Fifth and Fourteenth Amendments is the index of the protection such provisions give to air carriers under the Act. If these constitutional provisions do not guarantee profits to other public utilities there is no reason to suppose that they embody such a guarantee for air carriers alone.[95] No citation of authority is required to establish the view that "fair and reasonable" rates for public utilities afford the substantive protection provided by the Constitution. Such rates deal with the future and are not normally concerned with reimbursement of past losses. They are not subject to revision with respect to completed transactions but are final. Such rates afford an opportunity to earn a fair return but do not guarantee that such a return will, in fact, be earned. This Court has repeat-

[95] We are referring only to the Constitution and not the Act. The Court below stated, "We cannot find in this statute any language which indicates that Congress intended to guarantee to every carrier a profit" (R. 114).

edly held that the Constitution does not guarantee the reimbursement of losses incurred by public utilities prior to the date of the petition.[96]

We submit that the Constitution does not guarantee a profit to air carriers alone. The failure of the Act to guarantee such a profit, therefore, does not render it vulnerable to a charge of constitutional invalidity. The Constitution does not require a different construction of the Act than was reached by the Board and the Court below.[97]

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[96] *Federal Power Commission, et al.* v. *Natural Gas Pipeline Co., et al.*, quoted *supra*, pp. 35–36; *Galveston Electric Company* v. *City of Galveston, et al.*, 258 U. S. 388; *Georgia Railway and Power Company, et al.* v. *Railroad Commission*, 262 U. S. 625.

[97] In *Capital Airlines, Inc.* v. *Civil Aeronautics Board*, *supra*, decided December 6, 1948, the Court of Appeals for the District of Columbia Circuit had occasion to rule on the precise question presented here. We believe that the Court correctly analyzed and disposed of the issue in stating the following: "4. The power to increase retroactively established rates which have prevailed unchallenged is not needed to vindicate the Constitutional requirement for just compensation (Fifth Amendment), or to fulfill any contractual obligation of the Government to the air lines. The Civil Aeronautics Act, under which Capital chose to operate, embodies a scheme of just compensation for services rendered to the Government by requiring that fair and reasonable rates be fixed from time to time for carrying of the mail (Section 406 (a)). This right is protected by the privilege accorded carriers to apply at any time for higher rates to compensate for future service to the Government. The Act, with its regulatory provisions, is not intended to underwrite profitable operation of a carrier's business, any more than statutes imposing regulation of public utilities are intended to insure them a net revenue. *Federal Power Commission* v. *National Gas Pipe Line Co.*, 315 U. S. 575, 590, 86 L. Ed. 1037 (1942), and cases cited."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

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FEBRUARY 1949.

APPENDIX

The pertinent provisions of the Civil Aeronautics Act of 1938,[1] as amended, are as follows:

DECLARATION OF POLICY

SEC. 2. In the exercise and performance of its powers and duties under this Act, the [Board] shall consider the following, among other things, as being in the public interest, and in accordance with the public convenience and necessity—

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

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[1] Act of June 23, 1938, c. 604, 52 Stat. 977; Reorg. Plan No. IV, Sec. 7, effective June 30, 1940, 5 F. R. 2421, 54 Stat. 1235, 49 U. S. C. 401, et seq.

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign anod domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The regulation of air commerce in such manner as to best promote its development and safety; and

(f) The encouragement and development of civil aeronautics.

Certificate Required

SEC. 401. (a) No air carrier shall engage in any air transportation unless there is in force a certificate issued by the [Board] authorizing such air carrier to engage in such transportation; *Provided,* That if an air carrier is engaged in such transportation on the date of the enactment of this Act, such air carrier may continue so to engage between the same terminal and intermediate points for one hundred and twenty days after said date, and thereafter until such time as the [Board] shall pass upon an application for a certificate for such transportation if within said one hundred and twenty days such air carrier files such application as provided herein.

Application for Certificate

(b) Application for a certificate shall be made in writing to the [Board] and shall be so verified, shall be in such form and contain such information, and shall be accompanied by such proof of service upon such interested persons, as the [Board] shall by regulation require.

Issuance of Certificate

(d) (1) The [Board] shall issue a certificate authorizing the whole or any part of the transportation covered by the application, if it finds that the applicant is fit, willing, and able to perform such transportation properly, and to conform to the provisions of this Act and the rules, regulations, and requirements of the [Board] hereunder, and that such transportation is required by the public convenience and necessity; otherwise such application shall be denied.

Existing Air Carriers

(e) (1) If any applicant who makes application for a certificate within one hundred and twenty days after the date of enactment of this Act shall show that, from May 14, 1938, until the effective date of this section, it, or its predecessor in interest, was an air carrier, continuously operating as such (except as to interruptions of service over which the applicant or its predecessor in interest had no control), the [Board], upon proof of such fact only, shall, unless the service rendered by such applicant for such period was inadequate and inefficient, issue a certificate or certificates, authorizing such applicant to engage in air transportation (A) with respect to all classes of traffic for which authorization is sought, except mail, between the terminal and intermediate points between which it, or its predecessor, so continuously operated between May 18, 1938, and the effective date of this section, and (B) with respect to mail and all other classes of traffic for which authorization is sought, between the terminal and intermediate points

between which the applicant or its predecessor was authorized by the Postmaster General prior to the effective date of this section, to engage in the transportation of mail: *Provided*, That no applicant holding an air-mail contract shall receive a certificate authorizing it to serve any point not named in such contract as awarded to it and not served by it prior to April 1, 1938, if any other air carrier competitively serving the same point under authority of a contract as awarded to such air carrier shall prove that it is adversely affected thereby, and if the [Board] shall also find that transportation by the applicant to and from such point is not required by the public convenience and necessity.

Terms and Conditions of Certificate

(f) Each certificate issued under this section shall specify the terminal points and intermediate points, if any, between which the air carrier is authorized to engage in air transportation and the service to be rendered; * * *.

Authority to Modify, Suspend, or Revoke

(h) The [Board], upon petition or complaint or upon its own initiative, after notice and hearing, may alter, amend, modify, or suspend any such certificate, in whole or in part, if the public convenience and necessity so require, or may revoke any such certificate, in whole or in part, for intentional failure to comply with any provision of this title or any order, rule, or regulation issued hereunder or any term, condition, or limitation of such certificate: *Provided*, That no such certificate shall be revoked unless the holder thereof fails to

comply, within a reasonable time to be fixed by the [Board], with an order of the [Board] commanding obedience to the provision, or to the order (other than an order issued in accordance with this proviso), rule, regulation, term, condition, or limitation found by the [Board] to have been violated. Any interested person may file with the [Board] a protest or memorandum in support of or in opposition to the alteration, amendment, modification, suspension, or revocation of a certificate.

Application for Abandonment

(k) No air carrier shall abandon any route, or part thereof, for which a certificate has been issued by the [Board] unless, upon the application of such air carrier, after notice and hearing, the [Board] shall find such abandonment to be in the public interest. Any interested person may file with the [Board] a protest or memorandum of opposition to or in support of any such abandonment. The [Board] may, by regulations or otherwise, authorize such temporary suspension of service as may be in the public interest.

Carrier's Duty to Provide Service, Rates and Divisions

SEC. 404. (a) It shall be the duty of every air carrier to provide and furnish interstate and overseas air transportation, as authorized by its certificate, upon reasonable request therefor and to provide reasonable through service in such air transportation in connection with other air carriers; to provide safe and adequate service, equipment, and facilities in connection with such transportation; to establish, ob-

serve, and enforce just and reasonable individual and joint rates, fares, and charges, and just and reasonable classifications, rules, regulations, and practices relating to such air transportation; and, in case of such joint rates, fares, and charges, to establish just, reasonable, and equitable divisions thereof as between air carriers participating therein which shall not unduly prefer or prejudice any of such participating air carriers.

Power to Prescribe Rates and Practices of Air Carriers

SEC. 1002

(d) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the [Board] shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected or received by any air carrier for interstate or overseas air transportation, or any classification, rule, regulation, or practice affecting such rate, fare, or charge, or the value of the service thereunder, is or will be unjust or unreasonable, or unjustly discriminatory, or unduly preferential, or unduly prejudicial, the [Board] shall determine and prescribe the lawful rate, fare, or charge (or the maximum or minimum, or the maximum and minimum thereof) thereafter to be demanded, charged, collected, or received, or the lawful classification, rule, regulation, or practice thereafter to be made effective: *Provided*, That as to rates, fares, and charges for overseas air transportation, the Authority shall determine and prescribe only a just and reasonable maximum or minimum or maximum and minimum rate, fare, or charge.

Rule of Rate Making

(c) In exercising and performing its powers and duties with respect to the determination of rates for the carriage of persons or property, the [Board] shall take into consideration, among other factors—

(1) The effect of such rates upon the movement of traffic;

(2) The need in the public interest of adequate and efficient transportation of persons and property by air carriers at the lowest cost consistent with the furnishing of such service;

(3) Such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law;

(4) The inherent advantages of transportation by aircraft; and

(5) The need of each air carrier for revenue sufficient to enable such air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier service.

Effective Date of Orders; Emergency Orders

SEC. 1005. (a) Except as otherwise provided in this Act, all orders, rules, and regulations of the [Board] shall take effect within such reasonable time as the [Board] may prescribe, and shall continue in force until its further order, rule, or regulation, or for a specified period of time, as shall be prescribed in the order, rule, or regulation:

Suspension or Modification of Order

Sec. 1005

(d) Except as otherwise provided in this Act, the [Board] is empowered to suspend or modify its orders upon such notice and in such manner as it shall deem proper.

Judicial Review of [Board's] Orders

Orders of Authority Subject to Review

SEC. 1006. (a) Any order, affirmative or negative, issued by the [Board] under this Act, except any order in respect of any foreign air carrier subject to the approval of the President as provided in section 801 of this Act, shall be subject to review by the circuit courts of appeals of the United States or the United States Court of Appeals for the District of Columbia upon petition, filed within sixty days after the entry of such order, by any person disclosing a substantial interest in such order. After the expiration of said sixty days a petition may be filed only by leave of court upon a showing of reasonable grounds for failure to file the petition theretofore.

Power of Court

SEC. 1006. * * * (d) Upon transmittal of the petition to the [Board], the court shall have exclusive jurisdiction to affirm, modify, or set aside the order complained of, in whole or in part, and if need be, to order further proceedings by the [Board]. Upon good cause shown,

interlocutory relief may be granted by stay of the order or by such mandatory or other relief as may be appropriate: *Provided*, That no interlocutory relief may be granted except upon at least five days' notice to the [Board].

U. S. GOVERNMENT PRINTING OFFICE: 1949